

The Australian Way:  
A Critical Review of Australia's Responses to Refugees and Asylum Seekers  
1901-2013

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*We've got a good history around this. Really, the rest of the world is catching up to Australia.*

Scott Morrison, Former Minister for Immigration and Border Protection, January 2017

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## Abstract

When Coalition Prime Minister John Howard declared in 2001 that it was “in Australia’s national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country”, he argued that this was necessary not only to “protect Australia’s borders and to defend our right to decide who comes to this country and in what circumstances” but also to preserve Australia’s long-standing tradition of resettling offshore refugees under its formal humanitarian program.<sup>1</sup> According to Howard, onshore asylum seekers arriving by irregular means (so-called “boat people”) were displacing people whose claims for refugee status were more meritorious and testing the limits of Australia’s generosity. The defence of this program with the Pacific Solution measures was thus, in the words of Immigration Minister Philip Ruddock, “rational compassion”.<sup>2</sup> But for many other observers, when he drew a line in the sand against the *Tampa* asylum seekers and those who would follow in their wake, Howard was also drawing a line between Australia’s proud past as compassionate nation and generous supporter of refugees and its increasingly punitive border protection policies and cruel treatment of asylum seekers since then.

I take issue with both of these accounts that have together contrived to forge and sustain a dominant narrative about Australia’s refugee history, namely, that it is a long and proud one of generously offering hospitality to refugees. According to the former account, this is a long and unbroken history, which current border protection policies seek to defend; according to the latter, these policies represent a deviation from, and the destruction of, this proud history. In this thesis, I critically review Australia’s “proud” refugee history and its contemporary “aberrations”. While other scholars have compiled critical accounts of Australia’s responses to particular refugee populations or periods of history, this is the first comprehensive account of Australia’s responses to those seeking refuge within its borders and its approach to the principle of asylum from Federation in 1901 until the present era.

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<sup>1</sup> John Howard, interview with Neil Mitchell on Radio 3AW, Melbourne, 31 August 2001, <http://pmtranscripts.dpmc.gov.au/browse.php?did=12043>; accessed 26 February 2015.

<sup>2</sup> Philip Ruddock, ‘Girt By Sea – Correspondence’, *Quarterly Essay*, no. 6, 2002, p. 97.

While not disputing the humanitarian outcomes of Australian policy responses to various refugee crises over time – the large numbers of displaced persons who found refuge and made a home in Australia after the Second World War, or the integration of the Indochinese who were welcomed not long after the White Australia policy had been abandoned, for example – I nevertheless contest common accounts of Australia’s refugee history that construe the architects of such policies as exemplars of a proud humanitarian tradition. By measuring the success of these policies not merely according to their *outcomes* as viewed through the fuzzy lens of time but with respects to their *objectives*, I demonstrate a consistent trajectory to refugee and asylum policies that have been charted by both sides of politics in Australia since the birth of the modern state.

I show how Australia’s recent responses to asylum seekers arriving by boat were foreshadowed by its responses to earlier refugee populations. I argue that Australia’s approach to refugees has, since the beginning of the contemporary settler nation, been directed by its approach to immigration in general, with a conflation of the aims and objectives of these two very different policy areas that has persisted until the present. This has resulted in a selective approach to Australia’s humanitarian obligations that assesses people’s value before their vulnerability and privileges the protection of borders over the protection of people. It is an approach that has been characterised by restriction and selection and driven by the desire for control since Federation and was neatly summed up a century later by Howard’s message to the *Tampa* refugees: “we will decide who comes to this country and the circumstances in which they come”. These words will forever be associated with the 25<sup>th</sup> Prime Minister of Australia but, as this thesis clearly demonstrates, they were not invented by him and nor was “the Australian way” of dealing with refugees and asylum seekers.

## Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

In addition, I certify that no part of this work will, in the future, be used in a submission for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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## Acknowledgements

My favourite childhood film was the *Wizard of Oz*. I watched it countless times and never grew tired of it. I knew all of the words to all of the songs and most of the dialogue too. I read and loved the books by L. Frank Baum. I even performed in two productions of the musical, once as a poppy in the enchanted field that sends Dorothy to sleep and later treading the boards as an out-of-tune and uncharacteristically tall but enthusiastic Munchkin.

Like Dorothy, I began this journey in another place, in what seems like another lifetime and with a different destination in mind. The road to this point has been long and winding, with plenty of loose bricks to trip over, wrong paths to take, and obstacles along the way. I am so grateful to all the good witches and kindly wizards in the Department of Politics and International Studies in the School of Social Sciences and, previously, the School of History and Politics, at the University of Adelaide who equipped me for this journey, pointed me in the right direction and helped me on my way, who picked me up when I tripped over and pushed me on towards a destination that, at times, felt like a glimmering green mirage, always on the horizon. In particular, I am indebted to my principal supervisor, Professor Clem McIntyre, who has continued to supervise me even when his own adventures took him to far away lands, and to my co-supervisor, Professor Carol Johnson, who generously took on primary responsibility for me in his absence and in excess of her own considerable workload. It has been a privilege to be guided in this endeavour by two such exemplary academics. They have been generous in their supervision, kindly critical and keenly observant, and always encouraging and supportive. I am grateful for the intellectual guidance and administrative support they have provided, the time and energy they have invested in me, and for their constant encouragement, patience and perseverance.

People often talk about how isolating the experience of writing a thesis can be but for me the opposite has been true. Like Dorothy, I have enjoyed excellent company along the way. I have been sustained and entertained by a band of clever, caring and courageous companions travelling in the same direction, if at different speeds, along the road towards this goal. I would like to acknowledge the support of my good friends and fellow scholars, whose own



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feedback. He has been my kind and loving Tinman, waking me with coffees and putting me to bed at night. He has been my protective Lion, making me laugh, letting me cry, and roaring at my fears. He has expanded my brain, filled my heart and given me the courage and confidence to persevere until I reached the conclusion of this adventure. Over the course of my candidature and beyond, Paul has been my scruffy best friend, my constant companion, my greatest love. He has taken every step of this journey with me. I could not have done this without his enduring support, belief and love.

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## List of Abbreviations

ADF	Australian Defence Force
AES	Australian Election Study
AHRC	Australian Human Rights Commission
ALP	Australian Labor Party
AMD	Australian Maritime Domain
ANZUS	Australia, New Zealand and the United States (Security Treaty)
ASEAN	Association of Southeast Asian Nations
ASIO	Australian Security Intelligence Organisation
BPC	Border Protection Command
CEAS	Common European Asylum System
CAAIP	Committee to Advise on Australia's Immigration Policies
CLR	Commonwealth Law Reports
CMI	Certain Maritime Incident (the report of the Senate Select Committee on a Certain Maritime Incident)
CPA	Comprehensive Plan of Action
CPD	Commonwealth Parliamentary Debates
DFAT	Department of Foreign Affairs and Trade
DI	Department of Immigration (1945-74)
DIAC	Department of Immigration and Citizenship (2007-13)
DIBP	Department of Immigration and Border Protection (from September 2013 onwards)
DIEA	Department of Immigration and Ethnic Affairs (1976-87; 1993-96)
DILGEA	Department of Immigration, Local Government and Ethnic Affairs (1987-93)
DIMA	Department of Immigration and Multicultural Affairs (1996-2001; 2006-07)
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs (2001-06)
DL	Department of Labor and Immigration (1974-75)
DP	Displaced Person
FRY	Former Republic of Yugoslavia
HoR	House of Representatives
HP	Humanitarian Program

HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
IDC	Immigration Detention Centre
IDP	Internally Displaced Person
IHMS	International Health and Medical Services
IMA	Illegal/Irregular Maritime Arrival
IOM	International Organisation for Migration
IRO	International Refugee Organisation
IRPC	Immigration Reception and Processing Centre
KLO	Kosovo Liberation Army
MOU	Memorandum of Understanding
MP	Member of Parliament
MV	Merchant Vessel
NAA	National Archives of Australia
NGO	Non-Governmental Organisation
NPV	Non-permanent Visa
NSW	New South Wales
OEP	Offshore Entry Person
OECD	Organisation for Economic Cooperation and Development
PM	Prime Minister
PNG	Papua New Guinea
RAC	Regional Assessment Centre
RCM	Regional Cooperation Model
RCOA	Refugee Council of Australia
RPC	Regional Processing Centre
RPF	Regional Protection Framework
RRT	Refugee Review Tribunal
RSA	Refugee Status Assessment
SAC	Special Assistance Category
SHP	Special Humanitarian Program
SIEV	Suspected Illegal/Irregular Entry Vessel
SOLAS	Safety of Life at Sea
SS	Steamship

SUNC	Suspected Unlawful Non-Citizen
TPV	Temporary Protection Visa
UN	United Nations
UNC	Unlawful Non-Citizen (applies to those arriving to Australia without a valid visa)
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East

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**PART I**

**OF BOATS AND BORDERS: INTRODUCTION AND**

**BACKGROUND**

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*They went to sea in a sieve, they did;  
In a sieve they went to sea;  
In spite of all their friends could say,  
On a winter's morn, on a stormy day,  
In a sieve they went to sea.  
And when the sieve turn'd round and round,  
And every one cried, "You'll be drown'd!"  
They call'd aloud, "Our sieve ain't big:  
But we don't care a button; we don't care a fig:  
In a sieve we'll go to sea!"  
Far and few, far and few,  
Are the lands where the Jumblies live:  
Their heads are green, and their hands are blue;  
And they went to sea in a sieve.*

'The Jumblies' by Edward Lear



## 1.1 There are Boats and there are *Boats*: An Introduction

This thesis is all about boats. More specifically, it is about Australia's responses to boat-borne asylum seekers within the context of the nation's longer and larger refugee history.

Explanatory accounts of the former rarely take into account the latter, at least in accurate and meaningful ways. Rather, idealised versions of Australia's refugee history are commonly employed to either defend or, alternatively, decry current policies and practises for dealing with asylum seekers who arrive to Australia by boat. My thesis aims to repair the fracture between understandings of contemporary Australian responses to asylum seekers and Australia's historical responses to refugees. In doing so, it constitutes the first comprehensive account of this history from Federation until the present era.

As both an island continent and a nation of immigrants, boats play a special role in the national imagination of Australia. The first European settlers travelled here by boat and their arrival into Sydney Cove on 26 January 1788 is commemorated annually with a day of national celebrations. So too the subsequent generations of migrants who populated the country, who farmed its land, and built its cities. The long and arduous journeys they undertook to Australia suggest that the rewards it offered were substantial; not merely the "golden soil and wealth for toil" or the "beauty rich and rare" of which the national anthem boasts, but the chance for new beginnings and unbridled opportunities. As then-Prime Minister Julia Gillard observed on Australia Day in 2012, these migrants, including her own family,

left behind the life we knew: loved ones, familiar places, language, culture. [It was a] brave and often painful decision, but a good decision. Because for whatever we left behind, we gained so much more. Freedom and opportunity. Reward for effort. And a land of wide open spaces, not just geographically but wide spaces of the mind and heart to dream big dreams and imagine different, better futures free of fear.<sup>1</sup>

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<sup>1</sup> Julia Gillard, address to the Australia Day Flag Raising and Citizenship Ceremony, Canberra, 26 January 2012, <http://www.pm.gov.au/press-office/address-australia-day-flag-raising-and-citizenship-ceremony-canberra>; accessed 31 January 2012.

Her successor, Tony Abbott, also travelled to Australia by boat, aboard the ocean liner *Oronsay*, as a young child with his family who emigrated from Britain via the Assisted Passage Migration Scheme in 1960.<sup>2</sup> According to Abbott, migrants like his family, who chose to shift their lives to Australia, “are the ultimate vindication of Australia as a land of hope, reward and opportunity”. Moreover, they “have lent a heroic dimension to our national story. Like America, this country, too, has been a beacon of hope to ‘your poor, your huddled masses, yearning to be free’.”<sup>3</sup>

These days, however, with more efficient modes of transport, boats have more typically become an ostentatious symbol of privilege, a luxury holiday choice for the cosmopolitan elite, and a sport or hobby for the wealthy and time-rich. They nonetheless continue to play a central role in the Australian narrative as a unifying source of national pride. When *Australia II* won the America’s Cup in 1983, Prime Minister Bob Hawke, having stayed up all night to watch the race, postponed his own Cabinet meeting and jovially declared that any boss who sacked an employee for not turning up to work that day was “a bum”. According to Hawke, it was “a day for all Australians” who were united in celebrating this “absolutely marvellous” nautical feat.<sup>4</sup> Similarly, when 16-year-old Jessica Watson completed her record-breaking solo voyage around the globe in 2010, Prime Minister Kevin Rudd came to witness the triumphant return of *Ella’s Pink Lady* to Sydney Harbour amidst jubilant public celebrations and extensive media coverage – and waited patiently when it was delayed by several hours. Upon the boat’s eventual arrival, he declared it “a great day for our country” and hailed its captain “Australia’s newest hero”.<sup>5</sup> Watson’s feat was sold by the national media as an

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<sup>2</sup> See National Archives of Australia (NAA), A1877, 07/09/1960 ORONSAY ABBOTT R H; Tony Abbott, remarks at the Australia Day Flag Raising and Citizenship Ceremony, 26 January 2014, <https://www.pm.gov.au/media/2014-01-26/remarks-australia-day-flag-raising-and-citizenship-ceremony>; accessed 22 October 2014.

<sup>3</sup> Tony Abbott, vote of thanks at the Inaugural Multicultural Council Lecture, Parliament House, 19 September 2012, <http://www.liberal.org.au/latest-news/2012/09/20/tony-abbott-speech-vote-thanks-inaugural-australian-multicultural-council>; accessed 7 November 2014.

<sup>4</sup> Bob Hawke, interviewed live on Channel Nine immediately following Australia’s victory in the America’s Cup in 1983, footage available at <https://www.youtube.com/watch?v=BFw7iIvCFpo>; accessed 14 April 2013.

<sup>5</sup> Kevin Rudd quoted in ‘Watson Returns as Australia’s Newest Hero’, *ABC News*, 16 May 2010, <http://www.abc.net.au/news/2010-05-15/watson-returns-as-australias-newest-hero/827742>; accessed 18 May 2010.

“inspirational” demonstration of how hard work and unflagging self-belief were all one needed to achieve their personal dreams.

Yet, despite their pivotal role in the nation’s history, Australians have not been equally sanguine about all boats arriving on their shores. It seems that there are boats and there are *boats*. Or, more specifically, there are boats and there are SIEVs, the rather ironic acronym accorded to unauthorised boats (“suspected illegal/irregular entry vessels”<sup>6</sup>) arriving in Australian waters. This once obscure operational term entered the public lexicon in 2001 with the launch of Operation Relex, the first line of defence in the “war against boat people”<sup>7</sup> instigated by John Howard’s Coalition Government in the wake of the infamous *Tampa* incident, when the Australian Government refused entry into its territory to a Norwegian cargo ship that had rescued more than 400 asylum seekers from a distressed fishing vessel headed to Australia. Declaring, “we will decide who comes to this country and the circumstances in which they come”,<sup>8</sup> Howard charged the Australian Defence Force with the task of “forward deterrence”,<sup>9</sup> that is, detecting and repelling unauthorised vessels *before* they reached Australian waters. Rather than escorting intercepted SIEVs and their passengers to Australia for processing as had been done in the past, the Royal Australian Navy was now

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<sup>6</sup> The Howard Government’s preferred terminology, “suspected *illegal* entry vessels”, was changed under Labor in 2009 to “suspected *irregular* entry vessels” (see Australian Customs and Border Protection Service [ACBPS], *Annual Report 2008-09*, ACBPS, Canberra, October 2009, p. 228, [https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/ACBPS\\_AR\\_2008-09.pdf](https://www.border.gov.au/ReportsandPublications/Documents/annual-reports/ACBPS_AR_2008-09.pdf); accessed 12 April 2012), however, the Abbott Government subsequently reverted to “suspected *illegal* entry vessels” after it was elected in 2013. See Bianca Hall, ‘Minister Wants Boat People Called Illegals’, *Sydney Morning Herald*, 20 October 2013, <http://www.smh.com.au/federal-politics/political-news/minister-wants-boat-people-called-illegals-20131019-2vtl0.html>; accessed 10 May 2015. See also correspondence from Scott Morrison, Minister for Immigration and Border Protection (DIBP), to Martin Bowles, DIBP Secretary, 16 October 2013, <https://www.border.gov.au/AccessandAccountability/Documents/FOI/FA140900445.PDF>; accessed 4 April 2017.

<sup>7</sup> See, for example, Tony Kevin, ‘Remember SIEV X Before Waging War on Boat People’, *Eureka Street*, vol. 20, no. 13, 6 July 2010, pp.35-7; ‘Time to Ease Hard Line on Detention’ [editorial], *The Age*, 23 July 2002; ‘Australia’s Election: Three More Years’, *The Economist*, 15 November 2001, <http://www.economist.com/node/866234>; accessed 30 April 2015.

<sup>8</sup> John Howard, address at the Federal Liberal Party Campaign Launch, 28 October 2001, <http://web.archive.org/web/20020523100520/http://www.pm.gov.au/news/speeches/2001/speech1311.htm>; accessed 18 June 2013.

<sup>9</sup> Senate Select Committee on a Certain Maritime Incident, *A Certain Maritime Incident*, Commonwealth of Australia, Canberra, 23 October 2002, p. 14, [https://www.aph.gov.au/binaries/senate/committee/maritime\\_incident\\_ctte/report/report.pdf](https://www.aph.gov.au/binaries/senate/committee/maritime_incident_ctte/report/report.pdf); accessed 19 April 2017.

responsible for turning them back to whence they came, using, if necessary, a “more significant use of force”<sup>10</sup> than had been authorised in the past. Other than insisting that “[w]e don’t in this nation sink boats”,<sup>11</sup> the Government was circumspect about what sort and degree of force could be used to prevent unauthorized vessels reaching Australia.<sup>12</sup> Those who could not be turned back were henceforth taken to a third country (that is, somewhere other than Australia or their country of departure) for processing and resettlement or return under the newly negotiated Pacific Solution.

Edward Lear was, of course, referring to the common kitchen implement when he penned his nonsensical poem about the Jumblies, who went to sea in a sieve, but he might well have been observing the contemporary asylum debate in Australia. Like the Jumblies, with their heads of green and hands of blue, those who take to the seas in SIEVs (referred to as IMAs – ‘irregular/illegal maritime arrivals’<sup>13</sup>) are routinely depicted as alien and, despite their leaky vessels and their obvious vulnerability, treated as a threat to the nation’s security and its interests. They are perceived not as adventure seekers but fortune hunters, their voyages regarded not heroic but criminal, and their arrival greeted with consternation rather than celebration. These boats carry only a tiny proportion of the world’s asylum seekers, the vast

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<sup>10</sup> Rear Admiral Chris Ritchie, evidence presented to the Senate Select Committee on a Certain Maritime Incident, Canberra, 4 April 2002, p. 403, [http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/5411/toc\\_pdf/1646-2.pdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/5411/toc_pdf/1646-2.pdf); accessed 30 January 2015.

<sup>11</sup> Howard quoted in Mark Metherell, ‘Warships Sent to Boost Refugees Patrol’, *Sydney Morning Herald*, 3 September 2001.

<sup>12</sup> Though the rules of engagement remained classified (see Rear Admiral Ritchie, *op cit.*), the log of the HMAS *Adelaide*, the RAN vessel that intercepted SIEV 4 in October 2001, gives a good example of what they were. The log reveals that after verbal warnings were issued and ignored, the *Adelaide* attempted to intimidate the asylum seeker vessel with close-quarters manoeuvring and rounds of both cannon and machine gun fire in front of the vessel, before “aggressively boarding” the vessel to take control of the SIEV. Log summarized by Frank Brennan, ‘Developing Just Refugee Policies’, Southern Highlands Rural Australians for Refugees Public Meeting, Bowral NSW, 25 August 2002, cited in Chris Sidoti, ‘Truth Overboard: One Year After Tampa – Refugees, Deportees and TPVs’, Human Rights Council of Australia, <http://www.hrca.org.au/one%20year%20after%20tampa.htm>; accessed 3 January 2017.

<sup>13</sup> The term IMA, which refers to either “irregular maritime arrivals” (under Rudd/Gillard) or “illegal maritime arrivals” (under Howard and Abbott/Turnbull) was used in official documents until 1 June 2013, when use of the term “unauthorised maritime arrivals” (UMA) came into effect after being inserted into the *Migration Act*. See Australian Government, *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, <http://www.immi.gov.au/legislation/amendments/2013/130601/lc01062013-04.htm>; accessed 11 June 2015. Since it predominantly examines events occurring up until mid-2013, IMA rather than UMA will be used throughout this thesis.

majority of whom are invariably recognised as genuine refugees, and make up a very small fraction of the total number of people coming to Australia each year.<sup>14</sup> In 2013, Australia received less than 2.3% of the new asylum claims registered by the United Nations High Commissioner for Refugees (UNHCR), the international agency responsible for leading and coordinating the resolution of refugee situations and the protection of refugees around the world.<sup>15</sup> This included an unprecedented number of IMAs (20,587 in 2013). Even so, the number of IMAs granted protection under the humanitarian program in 2012-13 equated to just 1.2% the total immigration program (see Table 1.1.1).

**Table 1.1.1: The Composition of Australia’s Immigration Program 2012-13**

Planned intake	Migration 190,000			Humanitarian 20,000			
	Family	Skilled	Special Eligibility	Offshore		Onshore	
				Refugee	SHP	IMA	non-IMA
	60,185	128,970	845	12,000	8,000		
Outcomes	60,185	128,973	842	12,515		7,504	
				12012	503	4949	2555
	190,000			20,019			
210,019							

Source: Department of Immigration and Citizenship (DIAC), *Annual Report 2012-13*, DIAC, Canberra, 2013.

<sup>14</sup> Between 1976 and 2013 there were 73,156 irregular maritime arrivals (IMAs) and 4,058,800 permanent settlers. The number of IMAs (not all of whom were eventually accepted as refugees and resettled in Australia) therefore amounts to 1.8% of the immigration intake during this period. IMAs calculated from data provided in Janet Phillips, ‘Boat Arrivals in Australia: A Quick Guide to the Statistics’, Research Paper Series, 2013-14, Department of Parliamentary Services, Parliamentary Library, 23 January 2014, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2958111/upload\\_binary/2958111.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2958111/upload_binary/2958111.pdf); accessed 25 March 2015. Permanent settlers calculated from Australian Bureau of Statistics, Time Series Workbook 3401.0 - Overseas Arrivals and Departures, Australia, Table 1: Total Movement, Arrivals – Category of Movement – Permanent Settler Arrivals January 1976 - August 2016, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3401.0Aug%202016>; accessed 13 October 2016.

<sup>15</sup> Only about 19% of all asylum claims were registered with UNHCR in 2013, which registered a provisional total of 1,067,500 new asylum claims in 167 countries (a figure that excludes claims made to European countries, which had not yet released their data at the time the report was published); Australia received only 24,300 (2.28%) of these. UNHCR, ‘Asylum Levels and Trends in Industrialized Countries 2013’, UNHCR, Geneva, 2014, pp. 3, 13, <http://www.unhcr.org/5329b15a9.html>; accessed 8 January 2015. The 2013 figures are representative of Australia’s share of asylum claims over time. Hatton and Moloney calculate that onshore asylum applications to Australia make up 2% of the total number of claims to 38 industrialised countries since 1989 and they point out that only a minority of refugees and asylum seekers are located in developed countries, so the proportion of the total number of claims is, in fact, much smaller. See Tim Hatton and Joe Maloney, ‘Applications for Asylum in the Developed World: Modelling Asylum Claims by Origin and Destination’, Department of Immigration and Border Protection Research Programme Occasional Paper Series, no. 14, April 2015, <https://www.border.gov.au/ReportsandPublications/Documents/research/hatton-applications-for-asylum.pdf>; accessed 26 October 2016.

Historically speaking, people who arrived by boat make up only a small proportion of those who have sought asylum in Australia; even taking into account the recent spikes in boat arrivals, the majority of asylum seekers have arrived in Australia by plane with a valid visa, subsequently applying for asylum (these people are referred to as non-IMAs) (see Figure 1.1.1).<sup>16</sup> Despite this, asylum seekers arriving by boat command the greatest part of the media's attention, political fire and public ire. The heightened anxiety over boat arrivals is made more puzzling by the fact that asylum seekers arriving irregularly (or "illegally" in the current government parlance<sup>17</sup>) by boat are more likely to have their claims for protection recognised than those arriving via regular channels (i.e. with a valid visa by plane) who subsequently apply for refugee status.<sup>18</sup> Indeed it is not because they do not have legitimate claims upon Australia's hospitality that they are so problematic but precisely because they do – those whose claims are deemed to be unfounded are classed as illegal immigrants and deported, but genuine refugees must be accommodated on the basis of these claims regardless of their "suitability" as a migrant. The fact that IMAs and non-IMAs tend to come from different countries – between 2009 and 2013 the majority of IMAs were fleeing Afghanistan, Iraq and Iran while non-IMAs came predominantly from China, India and Pakistan – highlights the fact that for the former, their mode of arrival is not a choice but a

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<sup>16</sup> See Janet Phillips, 'Asylum Seekers and Refugees, 'What are the Facts?', Social Policy Section, Australian Parliamentary Library, updated 2 March 2015, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/AsylumFacts](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts); accessed 22 April 2015; Department of Immigration and Citizenship, Submission to the Joint Select Committee on Australia's Immigration Detention Network, September 2011, p. 19, <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf>; accessed 13 February 2012.

<sup>17</sup> Although the current Coalition Government persists in classifying asylum seekers arriving by boat as "illegal arrivals", under Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees, to which Australia is party, it is not illegal to enter a country without authorization for the purpose of seeking asylum; while it is regarded as a breach of the *Migration Act 1958*, it is not a criminal offence in Australia. See Vicki Parker, Chief Lawyer, Legal and Assurance Division, Department of Immigration and Border Protection, Evidence to the Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 19 November 2013, pp. 31-3.

<sup>18</sup> Australians typically overestimate the proportion of asylum seekers in the annual immigration program and underestimate the number found to be genuine refugees. 25% of respondents in June 2010 and 23% of respondents in September 2011 thought that asylum seekers make up 25% or more of the annual immigration intake while a further 30% and 27% respectively could not estimate a number. Essential Report, 'Perceived Intake of Asylum Seekers as a Proportion of Annual Immigration', 26 September 2011, <http://www.essentialvision.com.au/perceived-intake-of-asylum-seekers-as-a-proportion-of-annual-immigration>; accessed 4 April 2017. 47% of respondents in January 2014 and 43% in April 2015 believed most asylum seekers arriving in Australia by boat are not genuine refugees. Essential Report, 14 April 2015, [http://essentialvision.com.au/documents/essential\\_report\\_150414.pdf](http://essentialvision.com.au/documents/essential_report_150414.pdf); accessed 5 April 2017.

necessity.<sup>19</sup> This is supported by refugee claim acceptance rates for these populations. According to Department of Immigration figures, the refugee acceptance rate for IMAs is typically around 90% compared to between 40-50% for non-IMA applicants.<sup>20</sup> As Khalid Koser points out this “means that arguably Australia is worrying about the wrong asylum seekers”.<sup>21</sup> Moreover, the number of so-called “illegal” arrivals – indeed, the number of IMA and non-IMA arrivals combined (that is, the total number of asylum applicants) – is dwarfed by the number of people who, having entered Australia legally, go on to overstay their visa, a population whose illegal presence in the nation rarely makes headlines or generates public concern. According to the Department of Immigration and Border Protection (DIBP), there were 62,700 unlawful non-citizens (or visa overstayers) in Australia at 30 June 2013, more than four and a half times the annual humanitarian quota of 13,750 and more than the total number of people arriving by boat to Australia between 2000-2013.<sup>22</sup>

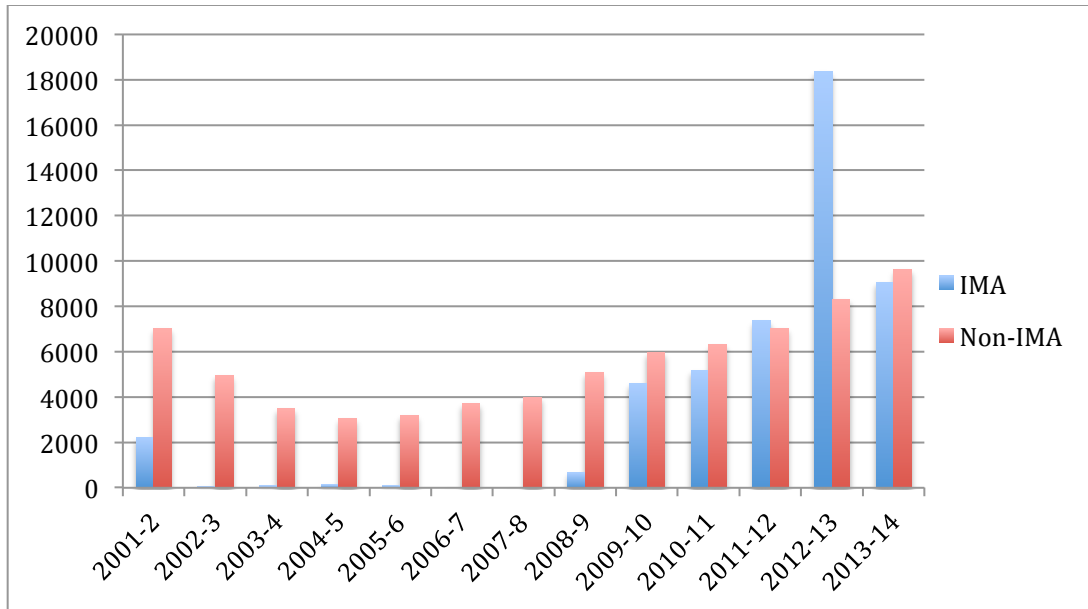
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<sup>19</sup> See Department of Immigration and Citizenship (DIAC), ‘Asylum Statistics – Australia: Quarterly Tables – June Quarter 2011’, <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylum-stats-june-quarter-2011.pdf>; accessed 26 March 2012; DIAC, ‘Asylum Statistics – Australia – Quarterly Tables – June Quarter 2012’, <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylum-stats-june-quarter-2012.pdf>; accessed 11 June 2015; and DIBP, ‘Asylum Statistics – Australia – Quarterly Tables – June Quarter 2013’, <http://www.immi.gov.au/media/publications/statistics/asylum/files/asylum-statistics-aus-jun-qtr-2013.pdf>; accessed 11 June 2015.

<sup>20</sup> In 2010-11, the number of finally determined protection visa grants to IMAs was 93.5% of the total for whom primary and review processes were completed; in 2011-12 it was 91%; and in 2012-13 it was 88%. This compares to 43.4%, 44% and 48.4% for non-IMAs for the same years. See *ibid.*

<sup>21</sup> Khalid Koser, ‘Responding to Boat Arrivals in Australia: Time for a Reality Check’, Lowy Institute Analyses, December 2010, [https://www.lowyinstitute.org/sites/default/files/pubfiles/Koser\\_Responding\\_web\\_1.pdf](https://www.lowyinstitute.org/sites/default/files/pubfiles/Koser_Responding_web_1.pdf); accessed 10 January 2012.

<sup>22</sup> DIBP, *Australian Migration Trends 2012-13*, Economic Analysis Unit, Strategic Policy Evaluation and Research Branch, DIBP, Commonwealth of Australia, 2014, <http://www.immi.gov.au/publications/Documents/statistics/migration-trends-2012-13.pdf>; accessed 20 May 2015. This group is typically made up of visitors, students and people who entered Australia on working holiday visas. In 2012-13, the largest proportion of unlawful non-citizens were from China, followed by Malaysia, USA, UK and India.



**Figure 1.1.1: IMA refugee status determination requests and non-IMA protection visas lodged, 2001/02 to 2013/14**

Source: DIAC, ‘Asylum Trends – Australia: 2010-11’; DIPB, ‘Asylum Trends – Australia: 2012-13’; DIBP, ‘Asylum Statistics—Australia: Quarterly tables—June quarter 2014’.

And yet, though their passengers are vulnerable and few in number relative to both Australia’s immigration intake and the international context, these boats have a disproportionate impact on the national imagination. Elections have been fought and won – and fought and hung – over boats like these. Political leaders have been elevated and devastated by such boats. The Australian people rallied around its Government in 2001 when Liberal Prime Minister John Howard took a stand against the *Tampa* and those who would follow in its wake. The public expressed its strong approval of the Government’s handling of the issue and returned the Coalition to power several months later, despite it having trailed significantly behind Labor in the polls prior to the incident.<sup>23</sup> By contrast, Kim Beazely’s prevaricating on the issue proved disastrous for the Labor leader, who resigned after the

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<sup>23</sup> In early 2001, public surveys found that Labor was “surging to its biggest poll lead over the Coalition in more than six years”, with support for the Coalition at an all-time low. See Peter Browne, ‘Boats and Votes’, *Inside Story*, 6 July 2010, <http://inside.org.au/boats-and-votes/>; accessed 19 March 2012. The *Tampa* incident saw a revival of the Coalition’s fortunes, with 77% of the public agreeing, and 54% strongly agreeing, with the Government’s stance. Fran Kelly, ‘Tampa Issue Improves Coalition Election Prospects’, *7:30 Report*, ABC, <http://www.abc.net.au/7.30/content/2001/s357998.html>; accessed 28 February 2012. Of course, the 9/11 terrorist attacks in the United States that took place shortly after the *Tampa* stand-off played an important role in the Government’s recovery in the polls and eventual electoral success. See Browne, ‘Boats and Votes’.



election loss. Boats were not a major election issue in 2004 and 2007 only because they were not arriving and, when they did begin to arrive again, the public withdrew its support for the incumbent Prime Minister, Kevin Rudd, as did his party, which replaced him with a leader who promised a tougher approach to match the rhetoric of the Opposition. Boats consequently played a central role in the 2010 election campaign with both the Prime Minister, Julia Gillard, and her political rival, Liberal leader Tony Abbott, resorting to stunts, such as posing aboard military vessels, to illustrate their commitment to protecting the nation's borders and to promote their respective plans for 'stopping the boats'. The number of asylum seekers arriving by boat rose to unprecedented highs in 2012-13 (25,173), making it a key issue in the 2013 federal election. Throughout the election campaign, Abbott, who led the Liberal-National coalition to victory, evoked John Howard in both his policies and rhetoric, promising to turn asylum seeker boats away and to reintroduce temporary protection visas for refugees arriving by boat. "The essential point", he declared, "is this is our country and we determine who comes here".<sup>24</sup> As it had in the past, this proved popular to voters concerned about the boat 'crisis'. According to the Lowy Institute Poll in March 2013, 74% of respondents were concerned about "unauthorised asylum seekers coming to Australia by boat" and the majority (57%) believed that the Coalition was better at dealing with the issue.<sup>25</sup> Another poll, in June 2013, found that "the asylum seeker issue" was important to 71% of people who were surveyed regarding which were the defining issues in determining their vote in the 2013 election.<sup>26</sup>

Even in their absence, boats continue to dominate the headlines and debate with both the former and current Coalition prime ministers recently promoting 'the Australian way' of stopping the boats to international audiences. In London in October 2015, Abbott spoke of

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<sup>24</sup> Bianca Hall and Judith Ireland, 'Tony Abbott Evokes John Howard in Slamming Doors on Asylum Seekers', *Sydney Morning Herald*, 15 August 2013, <http://www.smh.com.au/federal-politics/federal-election-2013/tony-abbott-evokes-john-howard-in-slamming-doors-on-asylum-seekers-20130815-2rzzy.html>; accessed 15 August 2013.

<sup>25</sup> Alex Oliver, 'The Lowy Institute Poll 2013: Australia and the World: Public Opinion and Foreign Policy', The Lowy Institute for International Policy, [http://www.lowyinstitute.org/files/lowypoll2013\\_web\\_corrected\\_p5.pdf](http://www.lowyinstitute.org/files/lowypoll2013_web_corrected_p5.pdf); accessed 28 June 2013.

<sup>26</sup> "The asylum seeker issue" was regarded as "quite important" for 37% of respondents, "one of the most important issues" for 28% and "the most important issue" for a further 6% of respondents in deciding which party to vote for in the 2013 election. Essential Report, 17 June 2013, <http://essentialvision.com.au/category/essentialreport/page/2>; accessed 24 June 2013.

“the moral duty to protect one’s own people” and suggested that the Australian experience, unique in its success against people smuggling, should be studied by European governments in order to “prevent a tide of humanity surging through Europe”.<sup>27</sup> The same message was reiterated by current Prime Minister Malcolm Turnbull, who boasted about Australia’s strong border protection policies and tough stance on people smuggling at a leaders summit on refugees convened by US President Barack Obama and the UN General Assembly in New York in September 2016.<sup>28</sup> “[H]ow so apparently minor an issue has had such an impact on our national life for such a protracted period of time” is, as Robert Manne observed, “[o]ne of the most intriguing puzzling questions of Australian politics”.<sup>29</sup>

But it was not always this way; or so many would have us believe. In recent times, refugee advocates, political commentators, progressive think tanks, prominent lawyers, eminent historians, famous authors and even former prime ministers have attempted to correct the “toxic” asylum debate by reminding us that things were once, and could again be, different.<sup>30</sup>

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<sup>27</sup> Tony Abbott, Margaret Thatcher Lecture, Margaret Thatcher Centre Gala Dinner, London, 27 October 2015, transcript published in full in *Sydney Morning Herald*, 28 October 2015, <http://www.smh.com.au/comment/europe-should-learn-from-australia-how-to-halt-refugees-tony-abbott-20151027-gkkaop.html>; accessed 30 October 2015

<sup>28</sup> Malcolm Turnbull, speech at President Obama’s Leaders’ Summit on Refugees, 21 September 2016, New York, <https://www.pm.gov.au/media/2016-09-21/speech-president-obamas-leaders-summit-refugees>; accessed 30 September 2016; and Turnbull, Australia’s National Statement in the General Debate of the 71<sup>st</sup> Session United Nations General Assembly, 21 September 2016, New York, <https://www.pm.gov.au/media/2016-09-22/australias-national-statement-general-debate-71st-session-united-nations-general>; accessed 30 September 2016.

<sup>29</sup> Robert Manne, ‘Comment: Asylum Seekers’, *The Monthly*, September 2010, pp. 8-14.

<sup>30</sup> See, for example, Refugee Council of Australia CEO Paul Power, quoted in Refugee Council of Australia, ‘UN High Commissioner Criticises Australia’s “Strange” Obsession with Boats’, 18 June 2014, <http://www.refugeecouncil.org.au/media/un-high-commissioner-criticises-australias-strange-obsession-with-boats/>; accessed 18 June 2014; Bianca Hall, ‘Australia’s Asylum Seeker Politics “Toxic” Since 2001: Tanya Plibersek’, *Sydney Morning Herald*, 3 February 2016, <http://www.smh.com.au/federal-politics/political-news/australias-asylum-seeker-politics-toxic-tanya-plibersek-20160203-gmkg4q.html>; accessed 3 February 2016; Centre for Policy Development, ‘Prominent Australians Urge Political Leaders to Break the Stalemate on Refugees and Asylum Seekers’, 24 August 2011, <http://cpd.org.au/2011/08/prominent-australians-urge-political-leaders-to-break-the-stalemate-on-refugees-and-asylum-seekers/>; accessed 12 September 2011; John Menadue, Arja Keski-Nummi and Kate Gauthier, ‘A New Approach: Breaking the Stalemate on Refugees and Asylum Seekers’, Centre for Policy Development, August 2011, [http://cpd.org.au/wp-content/uploads/2011/08/CPD-Refugee\\_Report\\_Web.pdf](http://cpd.org.au/wp-content/uploads/2011/08/CPD-Refugee_Report_Web.pdf); accessed 3 July 2013; Julian Burnside, ‘Celebrating the 50<sup>th</sup> Anniversary of Amnesty International: Lest We Forget’, Bob Hawke Prime Ministerial Centre, University of South Australia, Adelaide, 22 January 2012, audio available at <http://radioadelaidepublicdomain.wordpress.com/2012/01/22/celebrating-the-50th-anniversary-of-amnesty-international-lest-we-forget/>; Richard Flanagan, ‘Boat Tragedy: How Australia Became Complicit in the Horror of Christmas Island’, *The Guardian*, 16 December 2010, <http://www.guardian.co.uk/commentisfree/2010/dec/16/christmas-island-tragedy-australian-humanity>;

They regard the *Tampa* incident, which occurred shortly before the September 11 terrorist attacks in the United States, as a turning point in Australia's refugee history, the beginning of a 'punitive turn' in policies to deal with asylum seekers, and suggest that the policies pursued by both sides of politics since then (or, in some cases, since the introduction of mandatory detention under the Hawke and Keating Labor Governments in the early 1990s) represent a deviation from Australia's proud humanitarian record. They remind us of Australia's generosity shown to the Jewish refugees fleeing the Nazis in the 1930s and the way the nation welcomed Europe's displaced persons after the Second World War.<sup>31</sup> They speak with pride of Australia's role in the construction of the international refugee architecture in the postwar period.<sup>32</sup> They point to the generous policies under Liberal Prime Minister Malcolm Fraser and the principled bipartisanship that allowed such great numbers of Indochinese refugees to come to Australia in the aftermath of the Vietnam War.<sup>33</sup> They recall Labor Prime Minister Bob Hawke's emotional response to the Tiananmen Square massacre and his spontaneous promise to the 20,000 Chinese students in Australia at the time – and Chinese nationals who had overstayed their visas – that they would be granted Australia's protection.<sup>34</sup> They talk of the days before "the blight of mandatory detention"<sup>35</sup> or of its

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accessed 2 February 2012; Tim Winton, 'Tim Winton's Palm Sunday Plea: Start the Soul-Searching Australia', *Sydney Morning Herald*, 30 March 2015, <http://www.smh.com.au/action/printArticle?id=97891800>; accessed 30 March 2015; Malcolm Fraser, 'Asylum Seekers Go From Nothing to Zero Under Cruel Policy', *The Age*, 13 June 2011, <http://www.theage.com.au/federal-politics/political-opinion/asylum-seekers-go-from-nothing-to-zero-under-cruel-policy-20110612-1fz8s.html>; accessed 11 February 2012.

<sup>31</sup> See, for example, Robert Manne, 'The Road to *Tampa*', in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *The Legacies of White Australia: Race, Culture and Nation*, University of Western Australia Press, Perth, 2003, p. 167; see also Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *Refugee and Humanitarian Issues: Australia's Response*, DIMIA, Canberra, 2002, p. 7; DIMIA, *A New Life for Refugees*, DIMIA, Canberra, June 2005, [http://www.immi.gov.au/search\\_for/publications/new-life-ref/ahp-resource-schools.htm](http://www.immi.gov.au/search_for/publications/new-life-ref/ahp-resource-schools.htm); accessed 23 February 2012; Thomas Kenally, 'Politicians Must Stop Using Language to Strip Refugees of Their Humanity', *Sydney Morning Herald*, 11 June 2015, <http://www.smh.com.au/comment/politicians-must-stop-using-language-to-strip-refugees-of-their-humanity-20150610-ghkq7>; accessed 11 June 2015.

<sup>32</sup> See, for example, William Maley, 'Refugee Policy: Towards a Liberal Framework', *Policy*, vol. 18, no. 3, 2002, pp. 37-40; Julian Burnside, 'Australia Must Never Forget Its Shameful Past', *The Drum*, 19 October 2013, <http://www.abc.net.au/news/2013-10-17/burnside-people-of-letters/5027666>; accessed 19 October 2013.

<sup>33</sup> See, for example, Menadue, Keski-Nummi and Gauthier, 'A New Approach'; Malcolm Fraser, '2012 Gough Whitlam Oration', transcript published by *The Conversation*, 6 June 2012, <https://theconversation.com/malcolm-fraser-2012-gough-whitlam-oration-7524>; accessed 12 November 2014.

<sup>34</sup> Nic MacBean and Gillian Bennett, 'Tiananmen Witness's Painful Memories', *ABC News*, updated 5 June 2009, <http://www.abc.net.au/news/2009-06-04/tiananmen-witness-painful-memories/1703314>; accessed 2 April 2012; John Garnaut, 'Bloodshed Led to Another Cultural Revolution', *The Age*, 4 June 2009, <http://www.brisbanetimes.com.au/world/bloodshed-led-to-another-cultural-revolution-20090603-bvom.html>;

benign administrative purpose before it was transformed into a punitive tool of deterrence.<sup>36</sup> They argue that these historical precedents show that there are ways to deal with asylum seekers other than treating vulnerable people seeking Australia's protection as threats to national security and prosperity, and urge Australians to "reclaim that history".<sup>37</sup>

These voices include those of former Immigration Department Secretary John Menadue and former immigration policy advisors Arja Keski-Nummi and Kate Guthrie writing together for Centre for Policy Development, an independent think tank. They cite the examples of Labor Prime Minister Ben Chifley and his Immigration Minister Arthur Calwell, who oversaw the Displaced Persons Scheme, as well as Malcolm Fraser's response to the Indochinese refugee crisis, as examples of more principled leadership from which we can draw.<sup>38</sup> Similarly, while discussing Australia's accession to the 1951 United Nations *Convention Relating to the Status of Refugees* in 1954, academic, barrister and Vice President of the Refugee Council of Australia William Maley describes Menzies as "a compassionate and far-sighted man" whose vision "we need to recover".<sup>39</sup> Conservative commentator and head of the Sydney Institute, Gerard Henderson, recalls the "considerable compassion" of the Fraser and Hawke Governments.<sup>40</sup> Fraser himself repeatedly argued that the more compassionate and generous approach his Government adopted in the past worked and could work again,

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accessed 2 April 2012; Cynthia Bantham, 'Children of the Revolution', *Sydney Morning Herald*, 26 December 2003, <http://www.smh.com.au/articles/2003/12/25/1072308628745.html>; accessed 9 January 2012; Flanagan, 'Boat Tragedy'; Gerard Henderson, 'Girt By Sea - Correspondence', *Quarterly Essay*, no. 6, 2002, pp. 87-8; Keneally, 'Politicians Must Stop Using Language to Strip Refugees of Their Humanity'.

<sup>35</sup> Fraser, 'Asylum Seekers Go From Nothing to Zero Under Cruel Policy'.

<sup>36</sup> See Paul Keating cited in Paul Maley, 'Paul Keating Slams "Racist" Tone of Asylum Debate', *The Australian*, 23 March 2012, <http://www.theaustralian.com.au/national-affairs/immigration/paul-keating-slams-racist-tone-of-asylum-debate/news-story/902ee182445508e3e9b0afb8e38bb1a>; accessed 23 March 2012; and Manne, 'The Road to *Tampa*', p. 168.

<sup>37</sup> Fraser, 'Asylum Seekers Go From Nothing to Zero Under Cruel Policy'.

<sup>38</sup> Centre for Policy Development, 'Prominent Australians Urge Political Leaders to Break the Stalemate on Refugees and Asylum Seekers', 24 August 2011, <http://cpd.org.au/2011/08/prominent-australians-urge-political-leaders-to-break-the-stalemate-on-refugees-and-asylum-seekers/>; accessed 12 September 2011.

<sup>39</sup> Maley, 'Refugee Policy', pp. 37-40.

<sup>40</sup> Henderson, 'Girt By Sea - Correspondence', pp. 87-8.

asking “Why has nobody . . . tried to adapt that to today’s circumstances?”<sup>41</sup> The humanism of both the Fraser and Hawke Governments is also noted by writer Richard Flanagan who suggests that the “myth . . . of the boat people . . . has been a weeping sore at the heart of public life” in Australia since the early 1990s.<sup>42</sup> Immigration and refugee law experts Mary Crock and Andreas Schloenhardt agree with Flanagan, the latter arguing that the introduction of mandatory detention under the Keating Labor Government “mark[ed] the beginning of a gradual slide into a policy of ‘deterrence, detention and denial’”.<sup>43</sup> Academic and renowned public intellectual Robert Manne, on the other hand, talks about the “modest beginnings” of Australia’s mandatory detention system under Labor and argues that “[t]he Howard government’s refusal to allow the *Tampa* to unload its refugees on Australian soil represents a true turning point in the history of Australia”, marking the beginning of “a new anti-asylum seeker regime”.<sup>44</sup>

But the distance of time does funny things to memory and frequent and glib resort to particular memories or selective examples mean that histories can be easily skewed in one direction or another. These narratives, which might best be characterised as *advocate accounts*, attempt to draw upon the past in order to critique the present. But by focusing selectively on particular moments at the expense of others or indeed the whole, or on the positive outcomes of policies while neglecting the political objectives of those policies or the context in which they were forged, they mostly offer little more than simplistic solutions for more complicated and complex issues, such as simply repealing or reversing the offending policies and re-instating the ostensibly successful and more compassionate practises of the past.

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<sup>41</sup> Malcolm Fraser, ‘Vietnamese Refugees Were a Boon, Not a Burden’, *Sydney Morning Herald*, 29 July 2013, <http://www.smh.com.au/federal-politics/political-opinion/vietnamese-refugees-were-a-boon-not-a-burden-20130728-2qsh4.html>; accessed 29 July 2013.

<sup>42</sup> Flanagan, ‘Boat Tragedy’.

<sup>43</sup> Mary Crock, ‘Refugees in Australia: Of Lore, Legends and the Judicial Process’, keynote presentation at the *Annual Colloquium of the Australian Judicial Conference*, Darwin, 31 May 2003; and Andreas Schloenhardt, ‘To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia’, *International Journal of Refugee Law*, vol. 14, no. 2/3, 2002, pp. 302-3. See also Joshua Mostafa, ‘Against Progress: Dreams, Nightmares, and the Meaning of Abbott’, *Southerly*, vol. 74, no. 2, 2014, p. 99; Julie Macken, ‘The Long Journey to Nauru’, *New Matilda*, 12 January 2016, <https://newmatilda.com/2016/01/12/the-long-journey-to-nauru/>; accessed 4 March 2016.

<sup>44</sup> Manne, ‘The Road to *Tampa*’, pp. 164, 166.

The danger of this type of selective remembering is demonstrated by the fact that the same history is often used to promote the very policies that advocate accounts decay, and to shield their architects from such criticism. Recent Australian governments have repeatedly called upon Australia's "proud history" of refugee resettlement to help justify their tough border control policies and obscure a weak and waning commitment to the principle of asylum as enshrined in international law. Defending his response to the *Tampa*, Howard, for example, insisted,

Australia has always been generous. There is only one country on a per capita basis that takes more refugees than Australia and that is Canada. We are up there with the most generous and the most welcoming. And it's really partly in that context that the Government has taken the stance that it has in relation to the people who were picked out of the international waters, in an Indonesian search and rescue area by that Norwegian vessel.<sup>45</sup>

His Immigration Minister, Philip Ruddock, called this "rational compassion":

Only by retaining control of the system of international protection, including determining which refugees are in need of resettlement, can the international community ensure that the finite collective resources of governments are allocated effectively and efficiently. This is the only realistic and constructive approach – and one that reflects rational compassion.<sup>46</sup>

When Gillard took over from Rudd in 2010, she sought immediately to dismiss the idea that being "hard-headed" with respects to border protection meant that Australians were "hard-hearted" and drew upon Australia's "generous" record of refugee resettlement when promoting her Government's plan to send asylum seekers presenting on Australian shores to Malaysia in exchange for resettling refugees from that country.<sup>47</sup> After his political resurrection in 2013, Rudd adopted a similar tact. Announcing his plan to send all asylum

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<sup>45</sup> John Howard, speech at Community Morning Tea, Whitehorse Club, Burwood, 4 September 2001, <http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Speech/2001/speech1214.html>; accessed 17 September 2009.

<sup>46</sup> Philip Ruddock, 'Girt By Sea – Correspondence', *Quarterly Essay*, no. 6, 2002, p. 97.

<sup>47</sup> Julia Gillard, press conference, Canberra, 7 May 2011, <http://www.pm.gov.au/node/6884>; accessed 20 January 2017.

seekers arriving in Australia to Papua New Guinea for processing and resettlement or indefinite detention, he argued that “Australians are people with hard heads but also with a kind and compassionate heart” and made a point of emphasizing “that Australia [would] continue to take large numbers of genuine refugees through [its] existing global humanitarian program”.<sup>48</sup> And while Abbott seemingly had no issues with being perceived as hard-hearted with respects to asylum seekers,<sup>49</sup> he too argued that his Government’s tough policies were the necessary defence of Australia’s “proud history of giving shelter to those facing persecution”.<sup>50</sup>

Such claims about Australia’s generosity are somewhat disingenuous. Australia is one of only a handful of countries with well-established, longstanding, formal resettlement programs. But this does not mean it is one of only a handful of countries providing protection to refugees nor does it mean that it is “the most welcoming country in the world”.<sup>51</sup> Resettlement is only part of the refugee protection picture and a tiny part at that. Less than 1% of the global refugee population was resettled in 2013.<sup>52</sup> The vast majority of refugees and asylum seekers are hosted by developing nations while they await resettlement, repatriation, deportation or local integration. In 2013, Pakistan hosted 1,616,507 refugees, the most of any nation; Iran and Lebanon both hosted more than 850,000; Jordan and Turkey more than 600,000 each. Australia, by contrast, hosted 34,503, less than 0.3% of the refugees under UNHCR’s mandate, ranking 48<sup>th</sup> overall.<sup>53</sup> Its contribution was even less impressive when compared to other

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<sup>48</sup> Kevin Rudd, joint press conference, Brisbane, 19 July 2013, <http://pmtranscripts.dpmc.gov.au/browse.php?did=22763>; accessed 16 April 2015.

<sup>49</sup> While promoting the Australian model of border control to European audiences, Abbott spoke of being “toughminded”, and “denying people at the border” with the use of “some force” despite it “gnawing at our consciences”. Abbott, Margaret Thatcher Lecture. Elsewhere he suggested that “[e]ffective border protection is not for the squeamish”. Paul Karp, ‘Tony Abbott Says Europe is Facing “Peaceful Invasion” of Asylum Seekers’, *The Guardian*, 21 September 2016, <https://www.theguardian.com/australia-news/2016/sep/19/tony-abbott-says-europe-is-facing-peaceful-invasion-of-asylum-seekers>; accessed 21 September 2016.

<sup>50</sup> Tony Abbott, Lowy Institute, 8 June 2011, available from <http://www.tonyabbott.com.au>; accessed 14 June 2011.

<sup>51</sup> Barry Cohen, ‘If Only Other Countries Took As Many Refugees’, *The Australian*, 19 July 2012.

<sup>52</sup> United Nations High Commissioner for Refugees (UNHCR), *UNHCR Global Trends 2013: War’s Human Cost*, 20 June 2014, <http://www.refworld.org/docid/53a3df694.html>; accessed 30 April 2015.

<sup>53</sup> Refugee Council of Australia, ‘Pressing Need for Global Action to Tackle Protracted Displacement’, 23 June 2014, <http://www.refugeecouncil.org.au/wp-content/uploads/2014/12/140623-GlobalTrends.pdf>; accessed 13 March 2015.

nations by population size (62<sup>nd</sup>) and wealth (85<sup>th</sup>).<sup>54</sup> Despite a record number of asylum seeker arrivals in 2013, Australia was nevertheless ranked 30<sup>th</sup> overall in terms of asylum applications received, 41<sup>st</sup> per capita and 66<sup>th</sup> by wealth, its share of the burden piling in comparison to that of European countries like Germany, which received almost 130,000 applications for asylum compared to Australia's 15,977.<sup>55</sup> Nevertheless, such claims continue to be used to defend and distract from the Government's anti-asylum seeker policies.

Seeking to justify and maintain current policies, these *official accounts* of Australia's refugee history are diametrically opposed in their intended purpose to advocate accounts, which condemn those policies and agitate for change. Nevertheless, together, these two accounts have contrived to forge and sustain a dominant narrative about Australia's refugee history, namely, that it is a long and proud one of generously offering hospitality to refugees. In official accounts, this is a long and unbroken history and current border protection policies constitute the defence of this proud history. In advocate accounts, contemporary policies represent a deviation from, and the destruction of, this proud history. This narrative is central to the national identity; Australia's national anthem boasts of "boundless plains to share", and "compassion for those in need" is identified as a core Australian value in citizenship documents.<sup>56</sup> However, this narrative is problematic in that it offers no possibility of improvement in either the management of asylum seeker flows to Australia or the nation's treatment of asylum seekers and refugees who seek its hospitality. Congratulatory official accounts simply prescribe the maintenance (or extension) of the status quo – policies the Government knows to be damaging<sup>57</sup> – while advocate accounts demand a quixotic return to a mythologized past.

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Department of Immigration and Citizenship, 'Australian Values Statement – Permanent and Provisional', <http://www.immi.gov.au/living-in-australia/values/statement/long/>; accessed 18 June 2013.

<sup>57</sup> See, for example, the final report of the Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru*, 31 August 2015, available here: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Final\\_Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report); accessed 29 March 2016.



In this thesis I re-examine Australia’s “proud” refugee history and its contemporary “aberrations”. I critically review Australia’s responses to those seeking refuge within its borders and its approach to the principle of asylum from Federation in 1901 until the present era with the aim of addressing the puzzling question of why asylum seekers, particularly those arriving by boat, have had such a profound and enduring effect on the collective imagination of the nation. In doing so, I reject official accounts of an unblemished humanitarian record with respects to refugee reception and challenge advocate accounts that view the Howard Government’s response to the *Tampa* and subsequent boat arrivals as a turning point in Australia’s refugee policy trajectory. I also dispute those accounts that look a little further back to the introduction of mandatory detention for unauthorised arrivals under Labor in the early 1990s as the moment when Australia digressed from its humanitarian traditions. More controversially, I contest those accounts that regard the Fraser era as the pinnacle of Australia’s humanitarianism to which the nation ought return, and I reject the idea of a golden era of Australian humanitarianism that is ostensibly evidenced by Australia’s participation in post-war forums and treaties designed to establish and improve the international protection regime and the large number of migrants, displaced persons and refugees that Australia has ‘welcomed’ to its shores over the past century or so.

While not disputing the humanitarian outcomes of Australian policy responses to various refugee crises over time – the large numbers of displaced persons who found refuge and made a home in Australia after the Second World War, and the integration of the Indochinese who were welcomed not long after the White Australia policy had been abandoned, for example – I nevertheless contest common accounts of Australia’s refugee history that construe the architects of such policies as exemplars of a proud humanitarian tradition. By measuring the success of these policies not merely according to their *outcomes* (i.e. the raw numbers and/or the relative generosity in relation to other comparable countries) as viewed through the fuzzy lens of time but with respects to their *objectives*, I demonstrate a consistent trajectory to refugee and asylum policies charted by both sides of politics in Australia since the birth of the modern state. Australia’s policies might once have been less deliberately cruel but they were never particularly generous or compassionate in nature. I show how Australia’s recent responses to asylum seekers arriving by boat were foreshadowed by its responses to earlier refugee populations. I argue that Australia’s

responses to refugees have, since the beginning of the contemporary settler nation, been directed by its approach to immigration in general, with a conflation of the aims and objectives of these two very different policy areas that has persisted until the present. This has resulted in a selective approach to Australia's humanitarian obligations that assesses people's value before their vulnerability and privileges the protection of borders over the protection of people. It is an approach that has been characterised by restriction and selection and driven by the desire for control since Federation. It was neatly summed up a century later by Howard's message to the *Tampa* refugees: "we will decide who comes to this country and the circumstances in which they come".<sup>58</sup> These words will forever be associated with the 25<sup>th</sup> Prime Minister of Australia but, as this thesis clearly demonstrates, they were not invented by him and nor was the current Australian approach to asylum – it is the Australian way.

### Literature review

Though it challenges the dominant narrative, this is not a revisionist version of Australia's refugee history. Other scholars have critically examined various periods in Australia's refugee history or its responses to particular refugee populations and, as I do in this thesis, have shown that the nation's proud humanitarian reputation with respects to those populations and periods is inflated or underserved. Suzanne Rutland, Paul Bartrop and Michael Blakeney, for example, each conducted detailed studies of Australia's response to the Jewish refugee crisis of the 1930s and 1940s, exposing it as miserly and suggesting that the restrictiveness and selectiveness of Australia's migrant admission policies were driven by racial and religious prejudices.<sup>59</sup> The self-interested and selective nature of the postwar displaced persons scheme has been well documented by immigration historians including Eric Richards, James Jupp

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<sup>58</sup> Howard, address at the Federal Liberal Party Campaign Launch.

<sup>59</sup> Suzanne Rutland, *The Jews in Australia*, Cambridge University Press, New York, 2005, especially, pp. 51-65; Rutland, 'Australian Responses to Jewish Refugee Migration Before and After World War II', *Australian Journal of Politics and History*, vol. 31, no. 1, 1985, pp. 29-48; Rutland, 'Jewish Refugee and Post-War Immigration', in James Jupp (ed.), *The Australian People: An Encyclopedia of the Nation, its People and their Origins*, Cambridge University Press, Melbourne, 2001, pp. 534-9; Rutland, 'Postwar Anti-Jewish Refugee Hysteria: A Case of Racial or Religious Bigotry?', *Journal of Australian Studies*, no. 77, 2003, pp. 69-79; Rutland, "'The Unwanted": Pre and Post World War II Migration to Australia', *Yalkut Moresbet*, no. 2, Winter 2006, pp. 9-27; Michael Blakeney, *Australia and the Jewish Refugees, 1933-1948*, Croom Helm Australia, Sydney, 1985; Paul Bartrop, *Australia and the Holocaust 1933-45*, Australian Scholarly Publishing, Melbourne, 1994.

and Andrew Markus.<sup>60</sup> Frank Brennan, Klaus Neumann and David Palmer have chronicled the obstructionist role Australia played in the construction of the international refugee protection architecture in the post-war period.<sup>61</sup> Neumann has written about the harsh line adopted by the Australian Government towards those who fled across the border to the Australian Territory of Papua and New Guinea or to the Torres Strait islands after West Papua was relinquished by the Dutch, as well as Australia's reluctance to open its doors to the Asians expelled from Uganda in the 1960s.<sup>62</sup> Nancy Viviani, in her comprehensive account of Vietnamese migration to, and settlement in, Australia notes the initial resistance of the Fraser Government to accepting Indochinese refugees.<sup>63</sup> This reticence is also highlighted by Rachel Stevens, who argues that the Fraser Government's decision to substantially increase Australia's intake of Vietnamese refugees was driven by external pressures rather than altruistic domestic virtue.<sup>64</sup> Focusing on the same period, Jack Smit argues that introduction of legislation that allowed for the detention of unauthorized arrivals and introduced legal penalties for their transportation by the Fraser Government in the 1980s marked the beginning of the criminalization of asylum in Australia.<sup>65</sup> With respect to each of these periods or populations, these scholars observe the subordination of humanitarian values to community concerns, an unyielding attitude towards immigration control and a resistance to the provision of asylum that is at odds with the dominant

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<sup>60</sup> See James Jupp, 'Immigrant Settlement Policy in Australia', in Gary Freeman and James Jupp (eds), *Nations of Immigrants: Australia, the United States, and International Migration*, Oxford University Press, Melbourne, 1992, pp. 130-44; Eric Richards, *Destination Australia: Migration to Australia since 1901*, UNSW Press, Sydney, 2008; and Andrew Markus, 'Labour and Immigration 1946-9: The Displaced Persons Program', *Labour History*, no. 47, 1984, pp. 73-90.

<sup>61</sup> Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, University of Queensland Press, Brisbane, 2003, pp. 1-2, 15-18; Klaus Neumann, *Refuge Australia: Australia's Humanitarian Record*, UNSW Press, Sydney, 2004, pp. 79-91; David Palmer, 'The Quest for "Wriggle Room": Australia and the Refugees Convention, 1951-73', *Australian Journal of International Affairs*, vol. 63, no. 2, 2009, pp. 290-308.

<sup>62</sup> Klaus Neumann, 'Providing a "Home for the Oppressed"? Historical Perspectives on Australian Responses to Refugees', *Australian Journal of Human Rights*, vol. 9, no. 2, 2003, pp. 1-26; Neumann, 'Been There, Done That?', in Dean Lusher and Nick Haslam (eds), *Yearning to Breathe Free: Seeking Asylum in Australia*, Federation Press, Sydney, 2007, pp. 21-34; Neumann, 'Our Own Interests Must Come First: Australia's Response to the Expulsion of Asians from Uganda', *History Australia*, vol. 3, no. 1, 2006, pp. 10.1-10.17.

<sup>63</sup> Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia*, Melbourne University Press, Melbourne, 1984.

<sup>64</sup> Rachel Stevens, 'Political Debates on Asylum Seekers During the Fraser Government, 1977-1982', *Australian Journal of Politics and History*, vol. 58, no. 4, 2012, pp. 526-41.

<sup>65</sup> Jack Smit, 'Malcolm Fraser's Response to "Commercial" Voyages', *Journal of International Relations*, vol. 8, no. 2, 2010, pp. 76-103.

narrative of Australian humanitarianism yet consistent with current policies and practices. However, a vast divide exists between this literature and explanatory accounts of contemporary asylum seeker and border control policies.

Since 2001, Australia's approach to refugees and asylum seekers has generated a great amount of academic attention. Much of this scholarship takes a critical advocacy approach; for example, the excellent forensic investigation of the *Tampa* incident and its aftermath by journalists David Marr and Marian Wilkinson, the dedicated probing into the sinking of the SIEV X by former diplomat Tony Kevin<sup>66</sup> and researcher Marg Hutton (who maintains a detailed database of all asylum seeker arrivals, deaths and pushbacks), and the thoughtful, unrelentingly critical and constantly evolving work of political scientist Robert Manne.<sup>67</sup> But this literature generally neglects to situate contemporary policies and practices within the longer history of governmental responses and thus overlooks the continuity of key principles that are significant in explaining the contemporary situation. As noted, the legislative changes of the 1990s are sometimes taken as a starting point, the events of 2001 are typically regarded as a turning point, while the policies of the 1970s are usually perceived as a counterpoint to current policies, but few accounts look back further or draw on earlier periods for the foundations of Australia's present anti-asylum seeker stance and border protection policies. Thus, optimistic observers and commentators often mistake significant events that attract the

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<sup>66</sup> Tony Kevin, *A Certain Maritime Incident: The Sinking of SIEV X*, Scribe, Melbourne, 2004.

<sup>67</sup> See, for example, Robert Manne, 'Unthinkable Brutality? Who Cares...', *The Age*, 29 August 2002, <http://www.theage.com.au/articles/2002/04/28/1019441322692.html>; accessed 7 June 2012; Manne, 'The Road to *Tampa*'; Robert Manne with David Corlett, 'Sending Them Home: Refugees and the New Politics of Indifference', *Quarterly Essay*, vol. 13, 2004, pp. 1-95; Manne, 'What is Rudd's Agenda?', *The Monthly*, November 2008, pp. 22-32; Manne, '26 August – 11 September 2001. From *Tampa* to 9/11: Seventeen Days that Changed Australia', in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History*, UNSW Press, Sydney, 2009, pp. 239-54; Manne, 'Comment: Asylum Seekers', *The Monthly*, September 2010, pp. 8-14; Manne, 'The Moral Dilemma of Asylum Seeker Policy', *ABC Religion and Ethics*, 9 November 2010, <http://www.abc.net.au/religion/articles/2010/11/09/3061317.htm?site=northwest>; accessed 31 January 2011; Manne, 'Rudd's Downfall: Written in *The Australian*', *The Drum Opinion*, 5 September 2011, <http://www.abc.net.au/unleashed/2869942.html>; accessed 20 March 2013; Manne, 'How the Left Gone it Wrong', *The National Times*, 22 December 2011, <http://www.nationaltimes.com.au/opinion/politics/how-the-left-got-it-wrong-20111221-1p5jd.html>; Manne, 'The Search for the Least Bad Asylum Seeker Policy', *The Monthly*, 21 December 2011, <https://www.themonthly.com.au/blog/robert-manne/2011/12/21/1324426471/search-least-bad-asylum-seeker-policy>; accessed 30 May 2015; Manne, 'Australia's Shipwrecked Refugee Policy: Tragedy of Errors', *The Monthly*, March 2013, <https://www.themonthly.com.au/australia-s-shipwrecked-refugee-policy-tragedy-errors-guest-7637>; accessed 2 April 2015; Manne, 'Broken Faith in Politics', *The Monthly*, May 2015, <http://www.themonthly.com.au/issue/2015/may/1430402400/robert-manne/broken-faith-politics>; accessed 4 May 2015.

attention of the media and hold (invariably fleetingly) the public gaze, such as the tragic image of two year old Alan Kurdi, whose body washed up on a Turkish beach in 2015, unleashing an outpouring of grief and compassion for refugees around the globe,<sup>68</sup> as potential tipping points that might, at long last, tilt the scales in favour of a more compassionate approach to the plight of asylum seekers.<sup>69</sup> But what they fail to comprehend is the enormous weight of history that holds the status quo in place – a history that stretches much further back than 2001, 1992 or even 1976 and helps to explain both the construction and maintenance of the Australian approach to asylum.

There are some exceptions to this historical myopia, such as the work of Frank Brennan, Don McMaster and Klaus Neumann. Brennan's book, *Tampering with Asylum*, as the name suggests, was prompted by the "un-Australian" response of the Australian Government to the *Tampa*, but his deeper examination of the way Australia dealt with previous 'waves' of 'boat people' leads him to conclude that the brutal regime that was constructed in 2001, far from being un-Australian was, in fact, "very Australian".<sup>70</sup> In *Asylum Seekers: Australia's Responses to Refugees*, McMaster looks back to the formation of the nation to explain the disparate treatment of the Kosovar refugees and Chinese boat people who arrived in the late 1990s. He argues that Australia's discriminatory detention policies are an extension of the nation's controversial White Australia policies, designed to protect Australia from the Asian 'other' at the expense of its human rights obligations.<sup>71</sup> The most notable and extensive contribution comes from Neumann, who mines the archives for forgotten episodes and untold stories with which to dispel myths and challenge assumptions about Australia's

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<sup>68</sup> In Australia, chief executive officer Tim Costello reported an astonishing 3,000% increase in donations to World Vision Australia following the publication of the tragic image. See Daisy Dumas, 'Alan Kurdi Photo Triggered 3000 Per Cent Rise in Australian Charity to World Vision: Tim Costello', *Sydney Morning Herald*, 4 February 2016; <http://www.smh.com.au/national/alan-kurdi-photo-triggered-wave-of-australian-charity-to-world-vision-tim-costello-20160203-gmkgky.html>; accessed 3 March 2016.

<sup>69</sup> Similarly arresting events have included the multiple boat tragedies in 2012 that precipitated the convening of the panel of experts; the case of baby Asha, whose imminent return to Nauru prompted the "let them stay" campaign in February 2016; the crumbling of the offshore detention regime after the ruling by the Papua New Guinean Supreme Court in April 2016; and the leaking and publication of the Nauru files by *The Guardian* in August 2016.

<sup>70</sup> See Brennan, *Tampering with Asylum*, p. xii.

<sup>71</sup> Don McMaster, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press, Melbourne, [2001] 2002.

refugee history – its purported generosity with respects to refugees, its internationalism and commitment to the principle of asylum, and its experience of dealing with asylum seekers prior to the Vietnamese boat people amongst others. In addition to a wide array of academic journal articles, these stories have been compiled in two volumes: *Refuge Australia* (2004) and *Across the Seas* (2015). Neumann’s work is deliberately anecdotal and necessarily selective; he uses personal narratives to illuminate and enliven the policy debates of the past and, in doing so, both humanises and adds important detail to the footnotes of other histories, whose broad brushstrokes allow facts and figures to be moulded to suit the purposes of either advocate or official accounts as described above. Neumann takes a critical approach but sets out to neither condemn nor justify the status quo; rather he aims to “unsettle ideas about the present”,<sup>72</sup> revealing it to be both at once familiar and strange from the perspective of the past. While showing us that current policies and practices, often regarded as novel and shocking (such as turning away asylum seekers at the borders, forcibly repatriating refugees, and providing temporary protection) had historical precursors and precedents, he also reminds us that the current state of affairs was neither inevitable nor is it immutable. “[F]rom the viewpoint of the past”, Neumann suggests, “the present is but one possible outcome”.<sup>73</sup>

However, of these longer and more nuanced views of the historical record, none is comprehensive or current. In both his books as well as his greater body of work, Neumann focuses his attention on episodes in Australia’s immigration and refugee history *prior* to the arrival of the first asylum seeker boats in the late 1970s. While he suggests that his work can be taken as “an extended commentary on Australia’s responses to refugees and asylum seekers in the early twenty-first century”,<sup>74</sup> Neumann himself largely refrains from commenting on the present policies and practices.<sup>75</sup> His work provides an important historical context for understanding and contrasting the policies of the current era, but the connection between the two is something to which he only ever alludes. Brennan’s book, published in 2003, only examines events from 1951 up until 2001 while McMaster’s *Asylum*

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<sup>72</sup> Klaus Neumann, *Across the Seas: Australia’s Response to Refugees. A History*, Black Inc., Melbourne, 2015, p. 12.

<sup>73</sup> Neumann, *Refuge Australia*, p. 11.

<sup>74</sup> Neumann, *Across the Seas*, p. 13.

<sup>75</sup> *Ibid.*, p. 299.

*Seekers* was written before the events of 2001 and republished with a brief preface in 2002. Thus, while refugee and asylum seeker narratives have been woven into broader histories of immigration to Australia, such as Eric Richards' *Destination Australia* (2008) and James Jupp's *From White Australia to Woomera* (first published in 2002 and revised in 2007), there are no comprehensive and detailed accounts of Australia's responses to refugees and asylum seekers from Federation until the present era, a gap this thesis aims to fill.

Drawing on, and drawing together, this existing body of literature, my thesis builds upon the work of these scholars, combining, extending and, at times, contradicting their arguments and conclusions. It also employs a vast array of primary sources including parliamentary debates and reports, media releases and interview transcripts, internal memoranda, cabinet documents, official and personal correspondence, political biographies and autobiographies, immigration data, court rulings, international treaties and agreements, UNHCR and other non-governmental organisation reports and statistics, oral histories, public opinion polls and newspaper accounts to construct the first critical, current, and comprehensive history of Australia's responses to refugees and asylum seekers.

### **Format of thesis**

The thesis comprises a series of articles that have been published or accepted for publication in refereed academic journals throughout my candidature. These articles are complemented and connected by supplementary chapters that continue the narrative and contribute to the overall argument of the thesis. The subject lent itself to this format; the topical and very human nature of the issue at the heart of the thesis – asylum seeking – provided a strong imperative to publish my research where I felt I had an important contribution to make to the debate. As well as reaching a scholarly audience, the published works have been circulated independently amongst advocacy groups such as the Refugee Advocacy Network (RAN) and the Refugee Action Collective (RAC) in Victoria and read by the wider public, some of whom have subsequently corresponded with me. Their interest in my work and its deployment in public conversation and scholarly debate about asylum seeker policy has reinforced both my choice of topic and the decision to approach the thesis in this manner.

The inclusion of some chapters of the thesis in their published form means that they have (a) been edited to conform to the requirements of the journals in which they are published and (b) remain frozen in their published form. Where new research, events, or debates relevant to the content in them has emerged, this material has been integrated in the unpublished chapters of the thesis if possible. The articles are presented in their published form with the references and formatting adhering to the style requirements of each journal. The page numbers at the top of the pages and bottom right are as they appear in the various journals; however, for easy reference, I have added page numbers to the bottom centre of each page that are consistent with their placement within the thesis and correspond to the table of contents. All items referred to in these articles are also listed in the thesis bibliography.

### **Thesis overview**

Boats have divided the nation and they divide this thesis too, into four broad parts. Part I comprises this introduction and a background chapter that uses the tale of two boats, the *St Louis* and the *MV Tampa*, to describe the construction of two very different types of refugee architecture that are central to this thesis, namely, the 1951 United Nations *Convention Relating to the Status of Refugees* (henceforth the Refugee Convention) and, fifty years later, the Howard Government's Pacific Solution, to which past and present Australian refugee and asylum policies are contrasted. Despite the non-traditional format, the thesis thereafter follows a logical chronological narrative. Each of the subsequent parts is structured around one or more articles that has either been published or accepted for publication in a refereed academic journal. Part II critically re-examines Australia's historical responses to refugees from Federation until the arrival of the first boat carrying Vietnamese asylum seekers to Australian shores in the late 1970s; Part III begins with this boat and examines responses to the various 'waves' of asylum seekers that arrived during the Fraser, Hawke and Keating Governments and the development of refugee and asylum policy in response to these arrivals; and Part IV revisits the Howard Government's approach to refugees and asylum seekers prior to the *Tampa* incident as well as the post-*Tampa* period under the Rudd and Gillard Labor Governments. Each of these parts is outlined in more detail below.



Researching and writing about a contentious, important, and ongoing topic of public and official debate is like chasing a moving target. In order to complete this thesis, it was therefore necessary to draw a line somewhere. In light of the promise of a new and more compassionate direction in refugee and asylum policy he carried with him into office in 2007 (after the war-like approach of the outgoing Howard Government), the end of Rudd's second term, during which his Government adopted a very different and much tougher approach towards boat-borne asylum seekers, thus provided a neat end point for this thesis. There have, of course, been significant developments since September 2013 under the Abbott and Turnbull Coalition Governments that serve to further the main arguments presented here. The present situation is described briefly in Part V, which serves as a conclusion for the thesis. However, it was not possible to sufficiently analyse these developments within the confines of this already substantial thesis. They will instead form the basis of future work.

In order to provide sufficient context for those sections that have been published or prepared for publication, there are inevitably some instances of repetition of facts, analysis and argument. While every effort has been made to avoid unnecessary repetition, what reiteration remains nevertheless helps to reveal the strong and consistent argument that is built throughout this thesis.

## **PART I: Introduction and Background**

As noted, Part I comprises this introduction, **1.1 Of Boats and Borders**, and **1.2 Drawing a Line**, a background chapter, which uses the tale of two boats to introduce the two key points of reference for this thesis. The first, the ill-fated steamship (SS) *St Louis*, is remembered as a symbol of the apathy of the international community towards refugees prior to the Second World War, the shame of which provided the impetus for the establishment of the 1951 UN Refugee Convention in the post-war period. The second is the merchant vessel (MV) *Tampa*, the boat that was the catalyst for the construction of the so-called Pacific Solution by the Howard Government in 2001, which, for many, represented a repudiation of Australia's fine humanitarian record and the beginning of the dismantling of its commitment to the Refugee Convention and the principle of asylum. The development and detail of both the

international system of refugee protection and the Pacific Solution are important to what follows in the thesis, in which I aim to demonstrate that the Howard Government's approach to border protection from 2001 onwards was not an anomaly nor turning point in Australia's refugee record but rather a distinctly Australian response to unwanted claims on its hospitality. As the following chapters of the thesis demonstrate, this was an approach that both preceded and survived the Howard Government, and, indeed, was evident in the Howard Government's first and second terms in office (1996-2001).

## **PART II: Lest We Forget: Historical Responses to Refugees in Australia, 1901-1975**

Part II begins with 2.1 “‘Characteristically Generous’? Australian Responses to Refugees Prior to 1951’, an article that was published in the (ERA 2010 A-ranked) *Australian Journal of Politics and History* in June 2014. In this article, I cast a critical eye over a period in Australia's history – the first half of the twentieth century – that is proudly recalled for Australia's generosity towards the Jewish refugees fleeing Nazism in the 1930s and the displaced of Europe after the Second World War, as well as its role in the construction of the postwar international refugee architecture, which culminated in the 1951 Refugee Convention. I argue that Australia's responses to these refugee situations were neither exceptionally generous nor particularly compassionate; rather, they were selective and self-serving, designed to meet national rather than humanitarian interests. Instead of welcoming Europe's persecuted and displaced peoples with outstretched arms, successive Australian governments sought to actively restrict both who could come and Australia's obligations towards them. In each of these instances, and when it came to the drafting of the various international treaties relating to the provision of asylum in the 1950s, Australia's resistance to the principle of asylum, that is, the non-discriminatory provision of protection to refugees, is demonstrated. This ambivalence to asylum, I argue, was driven less by concerns about race than the desire for control, that is, the ability to choose who should come to Australia and the conditions under which they could come.

In the next chapter, 2.2 **Reluctant Refuge: Australia's Responses to Refugees and Asylum Seekers in the Postwar Period, 1956-76**, I consider Australia's responses to various postwar refugee crises in the context of the gradual liberalisation of White Australia and increasing internationalism. These include the Menzies Government's response to the

Hungarian refugees of the 1950s and the West Papuans in the early 1960s (the first refugee crisis Australia faced in its own region), the McMahon Government's treatment of the South Asians expelled from Uganda in the early 1970s, and, finally, the Whitlam Government's disparate responses to the Chilean and Vietnamese refugees. I argue that the gradual dismantling of Australia's discriminatory immigration policies and increasing internationalism during this period did not mean that Australia became less selective with respect to whom it welcomed to its shores and society. Rather than opening its doors more widely to previously excluded migrants, the liberalisation of Australia's immigration policies simply increased the pool from which Australia could select the very best migrants. This selectivity also applied to refugees who, in the absence of a formal refugee policy, continued to be admitted (or excluded) as migrants, with no loosening of the entry criteria based on humanitarian considerations. This meant that Australian governments during this period could and did screen humanitarian entrants depending on the economic circumstances and population and labour needs of the time, and/or the international reputational advantage or domestic political value of the refugees, as suggested by the disparate responses to these various refugee situations.

On the other hand, these changes would have significant implications for the admission of asylum seekers. While governments were able to control the selection of refugees in this manner, Whitlam's signing of the 1967 *Protocol Relating to the Status of Refugees* and the ratification of the *International Convention for the Elimination of All Forms of Racial Discrimination* with the *Racial Discrimination Act 1975* meant that Australia could no longer avoid obligations towards asylum seekers spontaneously presenting on its territory. The Indochinese refugee crisis provided the first test of Australia's commitment in this regard. This task, however, fell not to Whitlam but his successor Malcolm Fraser, whose response to the Indochinese is re-examined in the next part of the thesis.

### **PART III: The Uninvited: The Development of Refugee and Asylum Policy, 1976-96**

When the *Kiến Giang*, sailed into Darwin Harbour on 27 April 1976 with five Vietnamese asylum seekers on board, there was no established policy for dealing with either refugees or asylum seekers. As I demonstrate in Part II, Australia had, in the past, responded to refugee situations and the occasional cases of political asylum in an *ad hoc* fashion and its responses

were driven by communitarian concerns, such as the need for labour, population, security and regard for its international reputation, rather than cosmopolitan humanitarianism. The *Kiến Giang* was the first of 54 boats carrying 2,059 Indochinese asylum seekers that arrived on Australian shores between 1976 and 1982.<sup>76</sup> These arrivals – and the prospect of more – precipitated a shift from a reactive, impromptu approach to dealing with refugees to the development, under the stewardship of the Fraser Government, of a formal refugee and asylum policy underpinned by a set of guiding principles and the establishment of a humanitarian migrant intake stream that exists to this day. The Fraser Government’s approach is widely admired and often cited as a model to which contemporary Australia should return and other parts of the world should adopt. But rather than marking the beginning of a golden age of Australian humanitarianism from which Australia sharply deviated in 2001, in **3.1 ‘Welcome to Australia? A Reappraisal of the Fraser Government’s Approach to Refugees’**, an article that was published in the (ERA 2010 A-ranked) *Australian Journal of International Affairs* in 2014, I argue that this “change” was actually both consistent with what had come before (as described in the Part II) and, more significantly, formed the basis of the Australian model of asylum that Howard branded and packaged for export in 2001 as the Pacific Solution (discussed in Part I).

While recent Coalition governments have taken great pride in their successful record of stopping the boats (a record that, as I demonstrate, stretches back beyond the Howard Government to Fraser), Labor governments have typically been regarded alternatively, depending on one’s perspective, as “softer” on border control or more compassionate and cosmopolitan when it comes to refugee protection. **3.2 Bob’s Not Your Uncle: Refugee and Asylum Policy under Hawke and Keating, 1983-1996** looks at the way Fraser’s Labor successors, Bob Hawke and Paul Keating, dealt with refugees and the subsequent waves of asylum seekers who began arriving in 1989. As I demonstrate in this chapter, the preoccupation with ‘stopping the boats’ first exhibited by the Fraser and later the Howard (and now the Abbott/Turnbull Coalition) Governments was not a partisan obsession. When it came to uninvited asylum seekers, neither Hawke nor Keating was prepared to deviate from the course set by Fraser. Instead, asylum policies hardened under these Labor

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<sup>76</sup> Viviani, *The Long Journey*, p. 85.

governments, acting as a prelude to, rather than an exception from, what was to come under Howard.

#### **PART IV: Got to Keep Control: Australian Refugee and Asylum Policy at the Turn of the Millennium, 1996-2013**

In 4.1 ‘We Will Decide’: Refugee and Asylum Policy during the Howard Era before *Tampa*, which was published in (ERA B-ranked) *Australian Studies* in 2015, I examine policy innovations under the Howard Government, leading up to the 2001 *Tampa* incident, in response to the fourth wave of asylum seekers who arrived in Australia between 1996 and 2001. These measures included the reshaping of the migration program and cutting the humanitarian program, a retreat from both multiculturalism and multilateralism, and the introduction of temporary protection visas. It demonstrates that the Pacific Solution was not a departure from the Howard Government’s approach in its first two terms in office but, in fact, the opportunistic extension of its existing policies in this area.

Although the Pacific Solution received, for the most part, bipartisan support and reaped considerable political rewards for the Government at the subsequent election, Australia’s response in this high profile case, and the trajectory of its asylum policy in the wake of *Tampa*, attracted strong criticism both domestically and internationally. In Australia, Millbank argues that asylum became “a key symbolic issue in the so-called identity or cultural wars”<sup>77</sup> which, in 2007, eventually and dramatically swung in Labor’s favour. Labor leader Kevin Rudd promised to deliver a new and more compassionate era in Australia’s immigration history, with a “tough but humane” approach to asylum seekers. His Government capitalised on a period of respite from boat arrivals and relative public insouciance about asylum seekers to dismantle some of the most punitive aspects of the Howard era policies, effectively ending the Pacific Solution. However, as I show in 4.2 **Rhetorically Speaking: The Rudd Government’s ‘Tough but Humane’ Approach to Asylum Seeking 2007-10**, most of these changes proved to be symbolic or rhetorical only. As boat arrivals again increased from 2009 and the Government came under unrelenting pressure from the Opposition to re-

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<sup>77</sup> Adrienne Millbank, ‘World’s Worst or World’s Best Practice? European Reactions to Australia’s Refugee Policy’, *People and Place*, vol. 12, no. 4, 2004, p. 28.

implement the Howard Government's "tried and proven" policies, it resorted to similarly reactive and increasingly harsher measures designed to prevent boats from arriving on Australian shores. An abbreviated version of this chapter was published in the 2017 issue of (ERA B-ranked) *Arena Journal*. (The published article is included in this thesis as an appendix.)

These measures nevertheless had little impact on the rate of boat arrivals and the issue was regarded as pivotal in Rudd's replacement as Labor leader and hence Prime Minister by his deputy, Julia Gillard, in 2010. **4.3 Sanctuary Australia: The Gillard Government's Asylum Seeker Policies, 2010-2013** critically examines the solutions to the persistent problem of unauthorised boat arrivals pursued by the Gillard Government during its three-year term in office. The shape and success (or otherwise) of the Government's policies was, in many ways, dictated by an early election and tenuous victory at the beginning of Gillard's tenure. Anxious to appease the public, who were apprehensive of, and antipathetic towards, IMAs, and keen to legitimise her leadership, Gillard scrambled to put together a credible plan of action prior to the 2010 election. However, the haste and recklessness with which she constructed her ill-fated East Timor solution had the opposite effect; rather than taking control, the Government was instead perceived as out of control as the plan collapsed and boats continued to arrive in greater numbers than ever before. Only just managing to form a minority government, Gillard's subsequent attempts to develop and implement an effective, long-term, regional cooperative solution for the asylum seeker issue in line with Labor principles were subsequently stymied by judicial obstruction and a recalcitrant Opposition. Public disquiet continued to build with the number of boat arrivals, which peaked during Gillard's term, as well as a series of tragedies that resulted in an unprecedented number of documented asylum seeker deaths at sea.<sup>78</sup> Under these pressures and constraints, the Gillard Government found itself shifting further and further to the right on asylum and border control policy, and ultimately re-implementing and building upon the policies and practises of the Howard Government that Labor had categorically rejected in opposition and during

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<sup>78</sup> Almost 1,000 people drowning en route to Australia in just three years. Calculated from the Border Crossing Observatory, Australian Border Deaths Database, last updated 19 October 2016, <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>; accessed 1 February 2017.

the first Rudd Government. In contrast to Howard, who was focused on protecting Australia's borders from asylum seekers, and Rudd, who was determined (at least initially) to rescue Australia's humanitarian reputation and protect asylum seekers from people smugglers, preventing asylum seeker deaths at sea was used by Gillard to provide a moral justification for the formulation of harsh policies designed to appease the Australian community at the expense of those seeking sanctuary within its borders.

The way Australia has dealt with asylum seekers presenting on its shores in the twenty-first century has attracted significant international attention, both despairing and admiring, in the context of the greatest refugee crisis since the Second World War and the rise of anti-immigration, right-wing political parties across the globe. Both explanatory and normative accounts of these current policies and practises typically overlook their longer genealogy that stretches back to the turn of the twentieth century and the formation of the modern Australian nation state. But policies are cumulative constructions, always building on, adapting, or altering what came before. Though Australia's treatment of those making demands upon its hospitality is perhaps harsher today than ever before, via a detailed and critical examination of this history, I demonstrate in this thesis that the nation's current policies and practises are in line with its historical responses to refugees and asylum seekers. It *was* always this way; it is the Australian way.

## 1.2 Drawing a Line: The 1951 Refugee Convention and the 2001 Pacific Solution

### The Voyage of the *St Louis*

In 1936, Chaim Weizmann (who later became Israel's first Prime Minister) observed that the "world seemed to be divided into two parts – those places where the Jews could not live and those where they could not enter".<sup>1</sup> The 937 Jewish refugees who set sail from Hamburg aboard the SS *St Louis* in May 1939 demonstrated the tragic truth of this claim. Fleeing escalating persecution in Germany, the refugees were bound for Cuba, where they hoped to dock while they waited for visas to America. This trip, however, became known as the 'voyage of the damned' after Cuban authorities refused to allow the ship and all but 29 of its passengers to enter Cuba.<sup>2</sup> After appeals to other Latin American countries were rejected, the refugees turned to the United States and Canada. The United States Government responded by sending a gunboat to prevent the ship from entering its waters, while the Canadian Government replied that the refugees did not meet its immigration criteria. Worried that the *St Louis* refugees would "likely be followed by other shiploads", the Director of Immigration, Frederick Blair, declared that a "line must be drawn somewhere".<sup>3</sup> The *St Louis* eventually returned to Europe, where historians estimate that almost a third met their deaths during the Holocaust.<sup>4</sup> Commemorated in literature and film as well as history books, the fate of the *St Louis* and its passengers was not an exceptional tragedy but rather a commonplace example

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<sup>1</sup> Chaim Weizmann quoted in 'Settlement of Refugees', *Manchester Guardian*, 23 May 1936, p. 18.

<sup>2</sup> It is the subject of a book by Gordon Thomas and Max Morgan-Witts and a film of this name. Twenty-nine of the *St Louis*' passengers were allowed to disembark in Cuba (22 Jews with US visa, 4 Spanish nationals and two Cubans plus a passenger who had attempted suicide and was evacuated to hospital), the rest were turned away. See Sarah Ogilvie and Scott Miller, *Refuge Denied: The St Louis Passengers and the Holocaust*, University of Wisconsin Press, Madison, 2006, p. 13.

<sup>3</sup> Canadian Director of Immigration F.C. Blair quoted in Irving Abella and Harold Troper, "The Line Must Be Drawn Somewhere": Canada and Jewish Refugees, 1933-9', *Canadian Historical Review*, vol. 60, no. 2, 1979, pp. 178-80.

<sup>4</sup> Ogilvie and Miller suggest that 254 of the *St Louis*' passengers died during the Holocaust. See Ogilvie and Miller, *Refuge Denied*, pp. 174-5.



of devastating indifference to the plight of those fleeing Nazi persecution prior to, and during, the Second World War.<sup>5</sup>

Speaking in 1999 about the *St Louis* incident, incredulous that such a tragedy could ever have occurred, Holocaust survivor and Nobel Prize laureate, Elie Wiesel asked, “What happened? I don’t understand. Why the indifference, on the highest level, to the suffering of the victims?”<sup>6</sup> What happened, indeed? The world was not ignorant of the persecution of the German Jews in 1939. The international community could hardly fail to notice the steady stream of Jewish emigrants fleeing Germany as the Nazis progressively implemented measures designed to segregate, impoverish and ostracise them from 1933 onwards. Few could doubt the legitimacy of the German Jews’ fear of persecution at the hands of the Nazis after the *Kristallnacht* (“Night of Broken Glass”) pogrom of November 1938. During the pogrom, which was not officially sanctioned but was certainly implicitly endorsed and condoned by Hitler’s regime, 91 Jews were killed and between 25-30,000 were arrested and placed in concentration camps in response to the murder of a German diplomat in Paris at the hands of a Jewish youth. Hundreds of synagogues were destroyed, as well as the homes and businesses of thousands of German Jews. Those who were later released from the concentration camps were freed only on the condition that they leave Germany. These events were reported and condemned around the globe. The *Sydney Morning Herald* decried the “orgy of violence against helpless thousands of the innocent in reprisal for the guilt of a single individual”, and suggested that the pogrom bore “all the marks, not of sporadic mob violence, but of organised destruction”.<sup>7</sup> The German Government’s complicity in the incident was also noted by the *Argus* in Melbourne, which reported that the “the wholesale

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<sup>5</sup> The *St Louis* was not the only boat carrying Jewish refugees that was turned away, nor was it the greatest tragedy in terms of the numbers who perished as a result. In 1941, for example, an estimated 781 Romanian Jews (including more than 100 children) paid extravagantly for their passage to Palestine aboard the decrepit *Struma* to seek refuge from the Nazis. However, their boat’s engines failed near Istanbul and, under pressure from Britain, the Turkish Government refused to allow the refugees to enter Turkey. After a protracted stalemate the boat was towed to open water and abandoned to its fate. On 24 February 1942 the *Struma* was sunk by a Soviet submarine with just one survivor to recall the callous indifference with which the lives of those aboard had been treated. See Douglas Frantz and Catherine Collins, *Death on the Black Sea: The Untold Story of the Struma and World War II’s Holocaust at Sea*, HarperCollins, Sydney, 2003.

<sup>6</sup> Elie Wiesel, ‘The Perils of Indifference’, Millennium Lecture series hosted by US President Bill Clinton and First Lady Hilary Clinton, White House, Washington, 12 April 1999, <http://www.historyplace.com/speeches/wiesel.htm>; accessed 17 May 2010.

<sup>7</sup> ‘The Martyrdom of a Minority’, *Sydney Morning Herald*, 12 November 1938, p. 10.

punishment of thousands of innocent men, women, and children for a crime committed in another country by an apparently half-witted youth” had been “organised – if not by authority, without the opposition of authority”.<sup>8</sup>

### **Evian – a test of civilisation**

What happened to the passengers of the *St Louis* is, in some measure, explained by the events of the Evian conference convened by US President Theodore Roosevelt a year before the ill-fated ship set sail. Its primary purpose was to facilitate the involuntary emigration of the growing number of refugees fleeing the Nazis.<sup>9</sup> Writing for the *New York Times* in July 1938, Anne O’Hare McCormick suggested the conference was to be “a test of civilization”.<sup>10</sup> It was a test that the civilized world categorically failed. Delegates representing 32 states each expressed their concern about what was transpiring in Germany and their sympathy for the Jews and yet, as former US Vice President, Walter Mondale later observed,

[t]he civilized world hid in a cloak of legalisms. Two nations said they had reached the saturation point for Jewish refugees. Four nations said they would accept experienced agricultural workers only. One would only accept immigrants who had been baptized. Three declared intellectuals and merchants to be undesirable new citizens. One nation feared that the influx of Jews would arouse anti-Semitic feelings. And one delegate said this: “As we have no real racial problem, we are not desirous of importing one.”<sup>11</sup>

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<sup>8</sup> ‘Dispersion’, *The Argus*, 17 November 1938, p. 12.

<sup>9</sup> Resolution of the Intergovernmental Committee on Refugees, Evian, 14 July 1938. League of Nations, *Official Journal*, XIXth Year, no. 8-9, August-September 1938, pp. 676-7.

<sup>10</sup> Anne O’Hare McCormick, ‘Europe; The Refugee Question as a Test of Civilization’, *New York Times*, 4 July 1938, p. 12.

<sup>11</sup> Walter Mondale, ‘Evian and Geneva’, speech delivered at the United Nations Conference on Indochinese Refugees, 21 July 1979, [http://www.jewishjournal.com/marty\\_kaplan/article/the\\_best\\_speech\\_i\\_ever\\_wrote\\_20090730/](http://www.jewishjournal.com/marty_kaplan/article/the_best_speech_i_ever_wrote_20090730/); accessed 2 February 2010. The Dominican Republic was the only exception, offering visas and resettlement for up to 100,000 Jewish refugees, and donating a large area of land for the new settlements. However, the Government’s motives were considered somewhat suspect. Some have interpreted the surprisingly generous act of the Dominican Government, under the dictatorship of Rafael Trujillo, as an attempt to build favour with the international community after the so-called Parsley Massacre of up to 30,000 Haitians over a period of 5 days in 1937, or as an attempt to “whiten” and develop the island. Trujillo’s “*antibaitianismo*” (anti-Haitianism) is well documented, and serves to support these accounts.

This last delegate was the Australian Minister for Trade and Customs, Lieutenant-Colonel Thomas Walter White, whose words have since been immortalised at the Yad Vashem Holocaust Memorial in Jerusalem as representative of the apathy of the international community towards the Jewish refugees. At Evian, White argued that Australia had “her own particular difficulties” (namely, maintaining Australia’s cultural and ethnic homogeneity) and suggested that Australia was already doing its fair share by including a small proportion of Jews in its immigration quota “on a pro rata basis comparable with that of any other country”.<sup>12</sup> Back home, the refugees were perceived as a threat to Australian workers still recovering from the Depression.<sup>13</sup> Though, as *The Argus* reported on 17 November 1938, Australia’s “indignation [wa]s deep and her sympathy sincere”, the refugees were, quite simply, viewed as “not a problem for Australia, but for Europe”.<sup>14</sup> White insisted that under the circumstances, Australia could do no more and optimistically expressed hope “that the conference [would] find a solution to this tragic world problem”.<sup>15</sup>

History shows that, in the face of such apathy, the conference not only failed to find a solution, but in fact, the sympathetic inertia of the international community was reported in Germany and is alleged to have further fortified the Nazis’ resolve. Indeed, both the fruitless conference and, later, the ill-fated voyage of the *St Louis* were used as propaganda by the Nazis to justify their policies. The North German edition of *Voelkischer Beobachter*, for example, reported that “[f]ruitless debates at the Jew-Conference” at “the luxurious resort of Evian” had revealed that the international community, for all their moral outrage, was not

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<sup>12</sup> Lieutenant-Colonel Thomas Walter White, Australian Minister for Trade and Customs, speech at the International Conference on Refugees, Evian, France, 7 July 1938, National Archives of Australia (henceforth NAA), A434 50/3/41837.

<sup>13</sup> The member for Kalgoorlie, Albert Ernest Green, for example, exclaimed in Parliament: “For every Jew who is given a professional job in Australia, an Australian will be shut out. Why is it necessary for the Jews to leave Europe? I have no anti-Jewish feeling, and no racial hatred. ... I recognise that the Australian workers are being dismissed, and their place taken by refugees ... so far as Australia is concerned they are not required here.” Albert Ernest Green, *Commonwealth Parliamentary Debates* (henceforth CPD), House of Representatives (HoR), 15 June 1939, p. 1965. Even those more sympathetic to the plight of the Jewish people and supportive of Australia’s obligation to accept some such as Archbishop Daniel Mannix “hoped that they would be absorbed without dislodging the Australians from their work and without in any way upsetting the economic conditions of the country”. See ‘Dr Mannix’s Sympathy’, *The Argus*, 3 December 1938, p. 7.

<sup>14</sup> ‘Dispersion’, *The Argus*, 17 November 1938, p. 12.

<sup>15</sup> White, speech at the Evian Conference, 7 July 1938.

prepared to help the Jews<sup>16</sup> while the *Danziger Vorposten* argued that since “no one is ready to fight the cultural shame of Europe by admitting a few thousand Jews ... the conference justifies Germany’s policy against Jewry”.<sup>17</sup> Hitler himself taunted,

it is a shameful spectacle to see how the whole democratic world is oozing sympathy for the poor tormented Jewish people, but remains hard-hearted and obdurate when it comes to helping them – which is surely, in view of its attitude, an obvious duty. The arguments that are brought up as an excuse for not helping them actually speak for us Germans and Italians.<sup>18</sup>

As a result, some scholars have argued that the conference did more damage than good for the Jews.<sup>19</sup> Certainly, it proved to be of little value to the passengers of the *St Louis*.

### 1951 UN Refugee Convention

At the conclusion of the war, another conference was convened, this time by the newly established United Nations (UN), to address the collective failure of the international community to protect those who suffered at the hands of the Nazi regime and to deal with the remaining refugee crisis. At this conference in Geneva in 1951, the United Nations *Convention Relating to the Status of Refugees* (henceforth referred to as the Refugee Convention) was adopted, providing a clear definition of those who qualify as refugees and obliging its signatories not to turn away or return to danger to any claimants meeting this definition. A refugee is defined by the Convention as:

A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or

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<sup>16</sup> ‘No One Wants to Have Them’, *Voelkischer Beobachter*, 13 July 1938.

<sup>17</sup> *Danziger Vorposten*, 15 July 1938, cited in William R. Perl, *The Holocaust Conspiracy: An International Policy of Genocide*, Shapolsky Publishers, New York, 1989, p. 41.

<sup>18</sup> Adolf Hitler, speech 30 January 1939, in N.H. Baynes (ed.), *The Speeches of Adolf Hitler*, Oxford University Press, London, 1942, pp. 737-41.

<sup>19</sup> See, for example, Perl, *The Holocaust Conspiracy*, pp. 41-2; and Ervin Birnbaum, ‘Evian: The Most Fateful Conference of All Times in Jewish History, Part II’, *Nativ: A Journal of Politics and the Arts*, February 2009, <http://www.acpr.org.il/nativ/0902-birnbaum-E2.pdf>; accessed 17 May 2012.

her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>20</sup>

The Convention established minimum standards for the treatment of those fitting its definition of a refugee and claiming asylum, not precluding the implementation of higher standards by signatories, including the freedom to practise religion, access to courts, property, housing, employment, welfare and education rights and freedom of movement. As the requisite sixth signatory, it was Australia's accession to the treaty that brought the Convention, described by Australia's representative to the United Nations, William Douglas Forsyth, as "the Magna Carta of the refugee", into force in 1954, an act Forsyth suggested was "evidence of our compassionate concern" about the plight of refugees.<sup>21</sup>

Previously, although states generally accepted their moral duty towards refugees, asylum was typically dealt with on an *ad hoc* basis,<sup>22</sup> an approach that had clearly failed in the context of the Second World War and its immediate aftermath. The Convention was constructed to rectify this and was designed specifically to deal with the refugee crisis in Europe resulting from the war. It was expected that this would be relatively quickly achieved, as indicated by the ambitious three-year mandate given to the newly appointed United Nations High Commissioner for Refugees (UNHCR).<sup>23</sup> As Haddad observes, "the consensus of the international community was that refugees and displaced persons were a creation of war, hence an end to the fighting would mean an end to the existence of such individuals".<sup>24</sup> The terms of the Convention were therefore limited to refugees in Europe displaced by events

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<sup>20</sup> Article 1 of the United Nations General Assembly, *Convention Relating to the Status of Refugees*, Geneva, opened for signature 28 July 1951 (entered into force 22 April 1954), United Nations Treaty Series, vol. 189, no. 2545, p. 152, <http://www.refworld.org/docid/3be01b964.html>; accessed 22 September 2016.

<sup>21</sup> William Douglas Forsyth, 22 January 1954, NAA, A1838 855/11/11, Part 5, cited in David Palmer, 'The Quest for "Wriggle Room": Australia and the Refugees Convention, 1951-73', *Australian Journal of International Affairs*, vol. 63, no. 2, 2009, p. 291.

<sup>22</sup> Jessica Rodger, 'Defining the Parameters of the *Non-Refoulement* Principle', LLM Research Paper International Law, Faculty of Law, Victoria University of Wellington, 2001, p. 3, <http://www.refugee.org.nz/Reference/JessicaR.htm>; accessed 28 January 2010.

<sup>23</sup> The Office of the UNHCR was established on 14 December 1950 by resolution 428 (V) of the United Nations General Assembly, which was to review the need for the continuation of the Office beyond 31 December 1953. See United Nations General Assembly, Annex to Resolution 428 (V), Statute of the Office of the Office of the United Nations High Commissioner for Refugees, 14 December 1950.

<sup>24</sup> Emma Haddad, *The Refugee in International Society: Between Sovereigns*, Cambridge University Press, Cambridge, 2008, p. 129.

prior to January 1951. However, in light of the unrelenting need for asylum from new conflict situations arising around the world, an additional Protocol was drafted in 1966 to remove the geographic and temporal limitations of the Convention, coming into force in October 1967.<sup>25</sup> Today, there are 148 signatories in total to the two documents, 145 to the Convention and 146 to the Protocol, but only 143 (including Australia) to both.

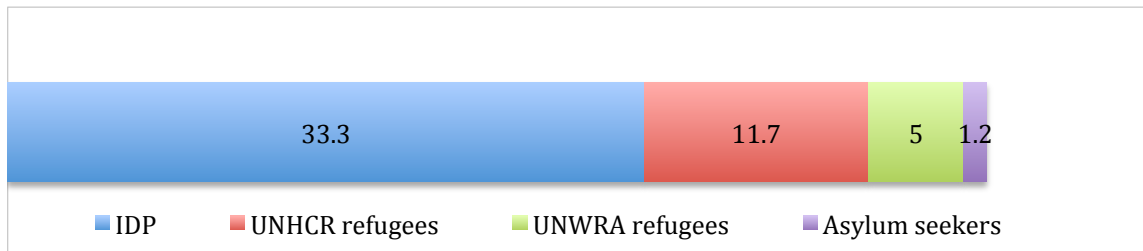
Despite the amendments of the Protocol, the scope of the Convention is deliberately narrow. While the provisions of the Convention are to be applied to refugees “without discrimination as to race, religion or country of origin” (Article 3), they exclude victims of generalised violence or persecution since persecution must be personal or particular to a group. As Mares observes, “[t]he tragic irony of the 1951 Convention is that the more generalised the violence in a given country, the less chance a national of that country has of being recognised as a refugee. ... If everyone and anyone is at risk of being killed or tortured, no one individual can claim persecution.”<sup>26</sup> It also excludes those displaced by extreme poverty or natural or manmade disasters, i.e. ‘environmental refugees’, who are thus regarded as economic migrants when they seek refuge outside of their own country. Significantly, since the Convention requires that persecuted people be “outside the country of [their] nationality” in order to be recognised as refugees, it does not cover internally displaced persons. According to UNHCR, 33.3 million of the 51.2 million forcibly displaced people around the globe in 2013 were internally displaced (see Figure 1.2.1).<sup>27</sup> Because refugees are required to proactively seek asylum by crossing the border of another country, Article 31 insists that signatory states “not impose penalties, on account of their illegal entry or presence, on refugees”, which effectively makes it legal to enter a Convention country by irregular means (i.e. without a valid visa) for the purposes of seeking asylum (or, at least, it recognizes that the act of seeking of asylum can require refugees to breach the national immigration laws of some countries, for which they should not be penalised).

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<sup>25</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, no. 8791, pp. 267-76.

<sup>26</sup> Peter Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa*, UNSW Press, Sydney, 2001, p. 172.

<sup>27</sup> See UNHCR, *UNHCR Global Trends 2013: War's Human Cost*, 20 June 2014, <http://www.refworld.org/docid/53a3df694.html>; accessed 30 April 2015.



**Figure 1.2.1: Global forcibly displaced population (millions), 2013**

Source: UNHCR, UNHCR Global Trends 2013: War’s Human Cost, 2014.

But while the Convention enshrines the right to *seek* asylum, it does not compel signatory states to *admit* refugees or to grant asylum, at least in the sense of providing permanent protection. Rather, it acknowledges that “the grant of asylum may place unduly heavy burdens on certain countries”<sup>28</sup> and “recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement”.<sup>29</sup> The central instrument of protection is therefore provided by Article 33, namely, the principle of *non-refoulement*, which ensures that refugees cannot be expelled or forcibly returned (*refouler* = to force back/to turn away) to a territory where they fear persecution.<sup>30</sup> This core principle is regarded by UNHCR as “so fundamental [to the Convention] that no reservations may be made to it”.<sup>31</sup> According to Hathaway, it has become a “de facto duty to admit the refugee”.<sup>32</sup> Once admitted, UNHCR seeks one of three durable solutions for refugees: repatriation, should a change of conditions in the refugee’s country of origin permit it; local integration into the country of asylum; or resettlement in a third country.

<sup>28</sup> Preamble to the *Convention Relating to the Status of Refugees*, 1951.

<sup>29</sup> Para IV(D) of the Final Act, *Convention Relating to the Status of Refugees*, 1951.

<sup>30</sup> *Convention Relating to the Status of Refugees*, Article 33, ‘Prohibition of Expulsion or Return (“Refoulement”)', p. 176.

<sup>31</sup> UNHCR, “Introductory Note” accompanying the text of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees’, Geneva, December 2010, <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>; accessed 3 September 2014.

<sup>32</sup> James Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 301.

These three principles – non-discrimination, non-penalisation and *non-refoulement* – are central to the provision of protection under the Convention. Nevertheless, (or perhaps, rather, as a consequence) these are the most controversial aspects at present, in a context that differs significantly from the time when the Convention was drafted. At that time, as the limited mandate of UNHCR suggests, the postwar refugee crisis was viewed as static and manageable. But as the Protocol reflects, and annual statistics show, the global refugee load has not abated but rather increased, as new conflicts have displaced a growing number of people from their homes. At the end of 2013, there were 51.2 million forcibly displaced people around the globe, including 16.7 million registered refugees (11.7 million registered with UNHCR plus five million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)) and 1.2 million asylum seekers (see Figure 1.2.1).<sup>33</sup> Those bearing the greatest burden of the global refugee crisis are inevitably countries neighbouring the major refugee producing nations who become countries of first asylum. In 2013, 86% of world's refugees were hosted by developing countries (primarily Pakistan, Iran, Lebanon, Jordan and Turkey).<sup>34</sup> These countries are the least equipped to deal with a crisis of this scale and clearly unable to integrate such great numbers of refugees. However, the Convention contains no burden-sharing mechanisms and, despite its principled cajolements, the rest of the world acts in a limited spirit of international cooperation. Resettlement programs, such as Australia's celebrated offshore humanitarian program, are voluntary undertakings outside of the obligations of the Convention and are both scarce and limited in scope. Only a handful of countries (most notably the United States, Canada, Australia and the Scandinavian countries) have longstanding and sizeable formal resettlement programs and of the 11.7 million refugees under UNHCR's mandate in 2013, just 98,400 (less than 1%) were resettled.<sup>35</sup>

With such poor odds of resettlement, facing ongoing insecurity and uncertainty and sometimes new forms of persecution in overcrowded and under-resourced refugee camps in

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<sup>33</sup> See UNHCR, *UNHCR Global Trends 2013*.

<sup>34</sup> *Ibid.*

<sup>35</sup> In 2013, 10.7 million people were newly displaced from their homes, contributing to a global total of 51.2 million displaced people at the end of the year. Of these, 16.7 million were refugees, 11.7 million of whom fell under UNHCR's mandate (the remaining 5 million were Palestinian refugees who were the responsibility of UNRWA). Just 98,400 of these refugees were resettled with or without UNHCR's assistance. See *ibid.*



countries of first asylum, it is unsurprising that refugees and asylum seekers are increasingly proactive in seeking access to the protection promised to them in wealthier Western nations under the terms of the Refugee Convention. Rapid developments in transport and communication technologies in the second half of the twentieth century have enlarged the possibilities for travel and thus the dispersion of refugees and asylum seekers across the globe, exposing parts of the world that were previously largely immune, such as Australia, to growing numbers of asylum claims. In 2013, for example, more than 15% of the world's refugees originated from Afghanistan and they sought asylum in 86 countries, including Australia.<sup>36</sup>

The rising number and spread of asylum seekers globally has been accompanied by increasing public 'asylum fatigue' and growing hostility towards refugees in host nations, particularly in the developed world, where the issue is complicated by, and/or frequently conflated with, the issue of illegal economic migration. This has been exploited by right wing nationalist parties as evidenced by electoral successes across the globe since the 1990s of parties such as Pauline Hanson's One Nation in Australia (first in 1996 and again in 2016), the British National Party, Geert Wilders' Freedom Party in the Netherlands, the Austrian Freedom Party, the Vlaams Blok party in Belgium, the Danish People's party, the National Front in France, the Northern League in Italy, the Sweden Democrats, and the Tea Party Movement and, more recently, Donald Trump in the United States. Despite the varying, and often limited, political fortunes of these groups, governments across the globe have universally responded to this trend with the progressive hardening of national asylum and border control policies in order to re-engage disaffected voters and limit the movement of support.<sup>37</sup> In this way, anti-immigration politics have, as Slavoj Zizek observes, gone

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<sup>36</sup> UNHCR, *UNHCR Global Trends 2013*.

<sup>37</sup> Coalition leader John Howard successfully co-opted much of One Nation's support by adopting a modified version of its program including a harsh approach to asylum seekers, almost halving the minor party's vote from 1998 in 2001. As Jupp notes, in Europe, where many governments are formed by coalition, anti-immigration parties may exert more influence than in the one or two party governments of Australia, New Zealand and a handful of European countries, although in recent years, the major parties in these countries have struggled to form majority governments. Italy, Austria, Denmark and the Netherlands have all had anti-immigration parties in government coalitions. See James Jupp, 'Immigration, Asylum and Extremist Politics – Europe and Australia', conference paper presented at *The Challenges of Immigration and Integration in the European Union and Australia*, University of Sydney, 18-20 February 2003, National Europe Centre Paper, no. 70, p. 8.

mainstream.<sup>38</sup> Governments have acted to limit access to their borders and hence their asylum procedures in a variety of ways: with stronger border protection policies, punitive deterrent measures and creative deterrence campaigns in countries of origin, stricter refugee determination procedures, stronger penalties for carriers (including airlines) of asylum seekers and less attractive reception conditions.<sup>39</sup> These practises often involve inventive redefinitions of who constitutes a refugee and self-serving interpretations of the principle of *non-refoulement* that threaten the integrity of the Convention; as then-UN Secretary General Kofi Annan argued, “when refugees cannot seek asylum because of offshore barriers or are detained for excessive periods in unsatisfactory conditions or are refused entry because of restrictive interpretations of the Convention the asylum system is broken and the promise of the Convention is broken too”.<sup>40</sup> And so it was, just two short years after Weisel beseeched the international community to guard against the indifference that sealed the fate of the passengers of the *St Louis*, that the world watched transfixed as the Government of a state that prides itself on being one of the most generous to refugees turned away from its territory an unarmed commercial vessel that had rescued hundreds of desperate asylum seekers from a sinking boat.

### History repeating – the *Tampa* incident

This is, of course, the story of the *MV Tampa*, the Norwegian cargo ship that answered a distress call issued by Australian authorities on 26 August 2001 and, as per international maritime convention, changed its course immediately to attend to the emergency. Captain Arne Rinnan and his crew of 27 rescued 438 asylum seekers from their ailing vessel, *Palapa 1*, which floundered *en route* from Indonesia to Christmas Island, where they intended to request asylum from the Australian Government. The majority of these asylum seekers were, like some 900,000 others in 2001, fleeing the repressive Taliban rule in Afghanistan, where,

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<sup>38</sup> Slavoj Žižek, ‘Barbarism with a Human Face’, *ABC Religion and Ethics*, 6 October 2010, <http://www.abc.net.au/religion/articles/2010/10/06/3030861.htm>; accessed 31 January 2011.

<sup>39</sup> Matthew Gibney suggests that “Host states must be like a cheap hotel room – decent enough to consider spending a night, but not the kind of place one would want to call home.” See Gibney, ‘Between Control and Humanitarianism: Temporary Protection in Contemporary Europe’, *Georgetown Immigration Law Journal*, vol. 14, no. 3, 2000, p. 705.

<sup>40</sup> Kofi Annan, UN Secretary General, address to the European Parliament, 29 January 2004, <https://www.un.org/sg/en/content/sg/statement/2004-01-29/secretary-generals-address-european-parliament-upon-receipt-andrei>; accessed 12 April 2017.

according to a UN report, they were subject to “serious violations of human rights under an authoritarian regime” including “arbitrary detention, cruel, inhuman and degrading punishments, summary executions and massacres”.<sup>41</sup> Having rescued the asylum seekers in the Indonesian maritime rescue zone,<sup>42</sup> Rinnan initially intended to head to Indonesia to discharge his new passengers before proceeding on to his original destination of Singapore. But under duress from the asylum seekers and with concerns about the seaworthiness of his overcrowded and under-supplied vessel (the *Tampa* was not licensed to carry more than 50 people<sup>43</sup> and had only expected to be rescuing around 80 people from the *Palapa*<sup>44</sup>), he changed course to the Australian territory of Christmas Island, which was the nearest port. Prime Minister John Howard refused the Norwegian captain permission to enter Australian waters, arguing “that it is in Australia’s national interest that we draw a line on what is increasingly becoming an uncontrollable number of illegal arrivals in this country”.<sup>45</sup> When the captain proceeded to enter Australia’s territorial waters, the Australian Government deployed Special Air Service (SAS) elite troops to board the ship in order to turn it away.<sup>46</sup> The parallels to the story of the *St Louis* did not go unnoticed, with both local and international news outlets observing “shades of the voyage of the damned... [i]n the waters between Indonesia and Australia”.<sup>47</sup>

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<sup>41</sup> Kamal Hossain, ‘Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Afghanistan’, Addendum, presented to the United Nations General Assembly, Fifty-Sixth Session, Agenda Item 119 c, Human Rights Questions: Human Rights Situations and reports of Special Rapporteurs and Representatives, A/56/409/Add., 5 November 2001.

<sup>42</sup> According to Marr and Wilkinson, the division of the Indian Ocean into zones of responsibility simply acknowledges that either country is ‘best placed’ to respond to emergencies and does not preclude either country from undertaking a rescue. Christmas Island is in the Indonesian zone. See David Marr and Marian Wilkinson, *Dark Victory*, Allen & Unwin, Sydney, 2003, p. 10.

<sup>43</sup> See Senate Select Committee on a Certain Maritime Incident, *A Certain Maritime Incident*, Commonwealth of Australia, Canberra, 23 October 2002, p. 1, [https://www.aph.gov.au/binaries/senate/committee/maritime\\_incident\\_ctte/report/report.pdf](https://www.aph.gov.au/binaries/senate/committee/maritime_incident_ctte/report/report.pdf); accessed 19 April 2017.

<sup>44</sup> See Marr and Wilkinson, *Dark Victory*, p. 3.

<sup>45</sup> John Howard, interview with Neil Mitchell, Radio 3AW, 31 August 2001, Melbourne, <http://pmtranscripts.dpmc.gov.au/browse.php?did=12043>; accessed 26 February 2015.

<sup>46</sup> Howard, *CPD*, HoR, 29 August 2001, p. 30501.

<sup>47</sup> American news report quoted in Charles Woolley, *60 Minutes* [TV program], Channel Nine, 2 September 2001, <https://pmtranscripts.dpmc.gov.au/release/transcript-11907>; accessed 21 September 2012; see also Edmond Roy, ‘Tampa Raises Spectre of Voyage of the Damned’, *PM*, ABC Radio, 30 August 2001, <http://www.abc.net.au/pm/stories/s355293.htm>; accessed 23 November 2016.

The Howard Government had for some time been struggling with how to deal with the rising number of asylum seekers arriving to Australia by boat. The start of Howard's tenure in 1996 coincided with the beginning of a new wave of asylum seekers primarily from Iraq and Afghanistan (see Figure 1.2.2).<sup>48</sup> Refugees from these countries, fleeing Saddam Hussein's regime and the Taliban respectively, primarily sought refuge in neighbouring countries in the region, namely, Iran and Pakistan. Following the rise of the Taliban to power in 1995, almost 1.5 million Afghan refugees were sheltering in Iran, 1.2 million in Pakistan and a further 60,000 in other countries around the world.<sup>49</sup> Additionally, Iran was host to nearly 580,000 Iraqi refugees.<sup>50</sup> These countries, however, were reluctant hosts and hostile environments for refugees who faced new forms of persecution and potential *refoulement*. The situation in Iran became more perilous for refugees after the election in 1997 of President Mohammad Khatami, who successfully campaigned with the refrain "Iran is for Iranians".<sup>51</sup> While Iran had become host to the greatest number of the world's refugees by 1999, it had also introduced a series of laws designed to remove as many as possible from its borders, with the revocation of refugee registration cards issued to Afghan Hazaras and restrictions on employment opportunities for refugees, who were confined to camps and issued with one-way 'aliens passports' and deadlines to leave the country.<sup>52</sup> In addition to "encouraging" refugees to leave in this manner, the Iranian Government forcibly returned an estimated 100,000 Afghans in 1999 as well as beginning deportations to Iraq.<sup>53</sup>

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<sup>48</sup> William Maley describes the persecution of Hazaras in Afghanistan and explains the outflow of refugees from Iraq and Syria in *What is a Refugee?*, Scribe Publications, Melbourne, 2016, pp. 101-26; see also Maley, *The Afghanistan Wars*, Palgrave Macmillan, London and New York, 2009; Maley, *Rescuing Afghanistan*, Hurst and Co., London, 2006; Maley, 'Hazaras', in John L. Esposito (ed.), *The Oxford Encyclopedia of the Islamic World*, vol. 2, Oxford University Press, New York, 2009, pp. 385-6.

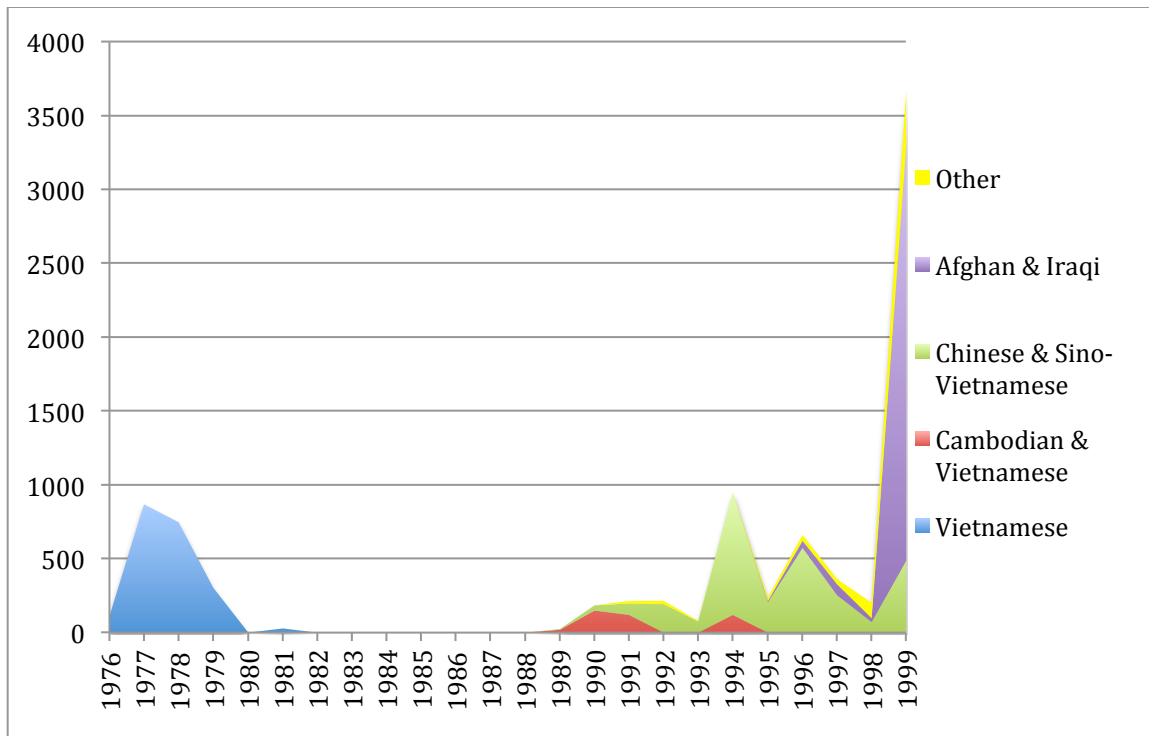
<sup>49</sup> UNHCR, 'Populations of Concern to UNHCR: A Statistical Overview, 1996', <http://www.unhcr.org/3bfa328c4.html>; accessed 20 March 2015.

<sup>50</sup> In 1996 there were 579,200 Iraqi refugees in Iran and 1,139 in Pakistan. See UNHCR, 'Populations of Concern to UNHCR: A Statistical Overview, 1996', <http://www.unhcr.org/3bfa328c4.html>; accessed 20 March 2015.

<sup>51</sup> Human Rights Watch, "By Invitation Only": Australian Asylum Policy', pp. 16-17, <https://www.hrw.org/reports/2002/australia/australia1202.pdf>; accessed 12 April 2017.

<sup>52</sup> *Ibid.*

<sup>53</sup> United States Committee for Refugees, 'World Refugee Survey 2000 – Iran', 1 June 2000, <http://www.refworld.org/docid/3ae6a8c423.html>; accessed 15 March 2017.



**Figure 1.2.2: Boat-borne asylum seekers, 1976-1999, showing four ‘waves’ of asylum seekers**

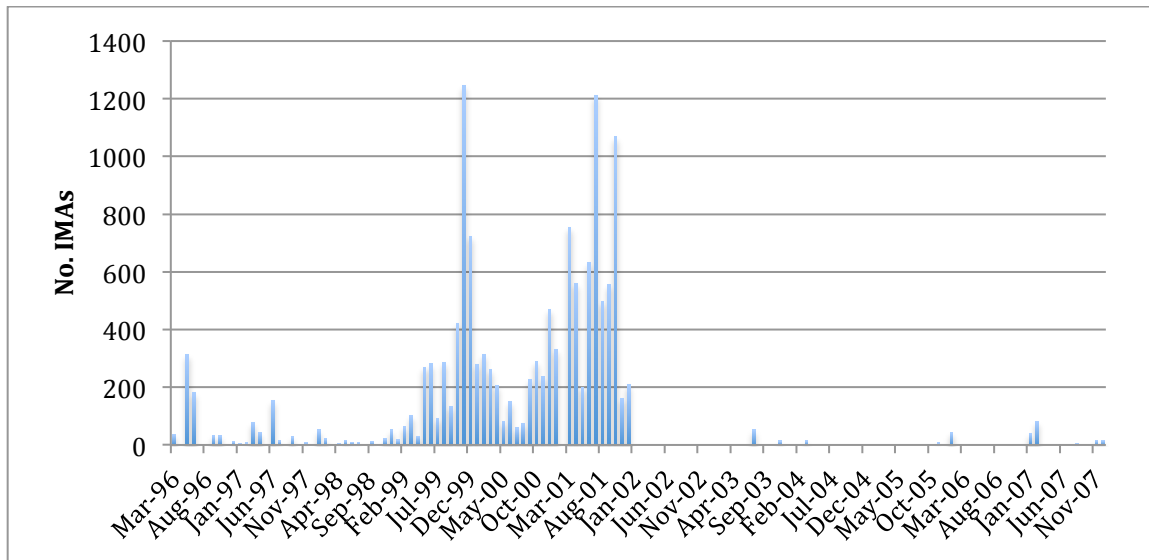
Source: DIMIA, Fact Sheet 74a – Boat Arrival Details (on Australian Mainland), 2004, [http://sievx.com/articles/psdp/DIMIA74a\\_boatarivals.pdf](http://sievx.com/articles/psdp/DIMIA74a_boatarivals.pdf); accessed 10 May 2012.

In 1999, just 28,770 refugees worldwide were resettled with the assistance of UNHCR from a global refugee population of more than 11.5 million people.<sup>54</sup> It is unsurprising then that refugees from the Middle East, despairing at the low and slow rate of resettlement, and, in some cases, being encouraged or forced to leave countries of first asylum, began to seek more permanent and protective refuge in countries further afield. They relied on the opportunistic people smuggling industry that sprang up as “a market response” to this widening gap between the need and availability of resettlement places.<sup>55</sup> Correspondingly, and in line with global trends, asylum seeker arrivals to Australia grew substantially from 1999 (see Figure 1.2.3), reaching an all-time high in the month of November with 1,246 asylum seekers arriving by boat, primarily from Afghanistan and Iraq and also China. While the Chinese asylum seekers were routinely repatriated, nearly all of the Middle Eastern

<sup>54</sup> UNHCR, ‘Refugees and Others of Concern to UNHCR: 1999 Statistical Overview’, UNHCR, Geneva, July 2000, <http://www.unhcr.org/3ac6bc834.pdf>; accessed 25 March 2015.

<sup>55</sup> Maley, *What is a Refugee?*, p. 13.

arrivals (97% of applicants from Iraq and 92% of Afghans<sup>56</sup>) were found to meet the definition for refugee status. In total, 3,721 asylum seekers arrived to Australia by boat in 1999.<sup>57</sup>



**Figure 1.2.3: IMAs per month during the Howard era (March 1996-December 2007)**

Source: DIMIA, Fact Sheet 74a – Boat Arrival Details (on Australian Mainland), 2004, [http://sievx.com/articles/psdp/DIMIA74a\\_boatarrivals.pdf](http://sievx.com/articles/psdp/DIMIA74a_boatarrivals.pdf); accessed 10 May 2012.

According to both the Government and the Opposition, this “assault on our borders”<sup>58</sup> constituted a “national emergency”.<sup>59</sup> The introduction of temporary protection visas (TPV) in October 1999 for refugees arriving by boat was intended to remove “incentives” (such as

<sup>56</sup> These figures for year ending 30 June 1999, cited in Refugee Council of Australia, ‘Statement on “Illegal” Boat Arrivals’, 15 November 1999, <http://www.refugeecouncil.org.au/docs/resources/ppapers/pp-boatarrivals-nov99.pdf>; accessed 24 March 2015.

<sup>57</sup> DIAC advice provided to the Parliamentary Library on 22 June 2009 cited in Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia Since 1976’, background note, Parliamentary Library, updated 23 July 2013, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5P1X6/upload\\_binary/5P1X6.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5P1X6/upload_binary/5P1X6.pdf); accessed 25 March 2015.

<sup>58</sup> Minister for Immigration and Multicultural and Indigenous Affairs Philip Ruddock, ‘Boat Arrival of 352 the Highest Ever’, media release, MPS 156/99, 29 October 1999, <http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99156.html>; accessed 27 March 2015; see also Ruddock, ‘More Illegals Arrive’, media release, MPS 164/99, 18 November 1999, <http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99164.html>; accessed 27 March 2015.

<sup>59</sup> Philip Ruddock quoted in Janine MacDonald, ‘Refugee Crisis Warning’ *The Age*, 18 November 1999, p. 1; Michael McKinnon, ‘Boatpeople Bill Hits \$200m’, *Courier Mail*, 10 November 1999, p. 1.

permanent protection and family reunion opportunities as well as access to settlement services including English language tuition) for refugees considering the risky sea voyage<sup>60</sup> but failed to slow the rate of arrivals. (The impact and implications of the introduction of TPVs under Howard are examined in Chapter 4.1 ‘We Will Decide’). A further 3,000 irregular maritime arrivals (IMAs) arrived in 2000 and were followed by more than 5,500 in 2001.<sup>61</sup> In total, more than 12,000 asylum seekers arrived by boat between 1999-2001 (inclusive; see Figure 1.2.3), including approximately 9,500 people fleeing the Middle East (predominantly Afghanistan and Iraq).<sup>62</sup> These people were subject to mandatory detention, established under Labor in the early 1990s, for the duration of the refugee determination process. Curtin and Woomera Immigration Reception and Processing Centres (IRPC) were opened in 1999 to accommodate the unprecedented numbers of detainees. The conditions in these crowded and isolated desert camps as well as delays in the processing of claims led to unrest and protests, including hunger strikes and lip sewing by detainees at Curtin in February 2000,<sup>63</sup> and break-outs and rioting at Woomera in June and August 2000.<sup>64</sup> These protests garnered unfavourable international attention ahead of the 2000 Sydney Olympics<sup>65</sup> but failed to generate much empathy amongst the Australian public, many of whom regarded these protests as “barbaric”<sup>66</sup> and “un-Australian”<sup>67</sup> and feared the Middle Eastern arrivals would “destroy our way of life, our culture and our civilisation”.<sup>68</sup>

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<sup>60</sup> Philip Ruddock, ‘Ruddock Announces Tough New Initiatives’, media release, 13 October 1999, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FYOG06%22>; accessed 25 November 2016.

<sup>61</sup> Phillips and Spinks, ‘Boat Arrivals in Australia Since 1976’.

<sup>62</sup> Department of Immigration and Citizenship, ‘Unauthorised Arrivals by Land and Sea’, Fact sheets 74 & 74a, cited in Joint Standing Committee on Migration, *Immigration Detention in Australia: Facilities, Services and Transparency*, Third Report of the Inquiry into Immigration Detention in Australia, Canberra, August 2009, p. 3.

<sup>63</sup> ‘Detainees Sew Lips in Protest’, *Sunday Times*, 6 February 2000; Colleen Egan, ‘Ruddock Unmoved by Grisly Protest’, *The Australian*, 7 February 2000, p. 3.

<sup>64</sup> Stephen McDonnell, ‘The Queue Jumpers’, *Four Corners*, 16 October 2000, <http://www.abc.net.au/4corners/stories/s200031.htm>; accessed 29 July 2016.

<sup>65</sup> See Bruce Haigh, ‘Inhumane Approach to Victims Shames Us’, *The Australian*, 22 June 2000, p. 15.

<sup>66</sup> Talkback radio caller quoted in McDonnell, ‘The Queue Jumpers’.

<sup>67</sup> *Ibid.*

<sup>68</sup> J. Thompson, ‘In brief’, *The Age*, 23 November 1999, cited in David Corlett, ‘Politics, Symbolism and the Asylum Seeker Issue’, *UNSW Law Journal*, vol. 23, no. 3, 2000, p. 16. See also McDonnell, ‘The Queue Jumpers’; Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, University of Queensland Press, Brisbane, 2003, p. 41.

Nevertheless, the unabated flow of asylum seekers posed a problem for the Government in the lead-up to the 2001 federal election. Polling at the beginning of the year indicated the Government was in a precarious position, trailing the Opposition on the primary vote.<sup>69</sup> The Opposition's lead was even greater in February with at least one poll suggesting that Howard was in danger of losing his own seat.<sup>70</sup> By March, the Coalition's primary vote had dropped to a historic low of 30%, falling another half a point by the end of the month.<sup>71</sup> Meanwhile, the Australian Labor Party (ALP) had a primary vote of 48.5% and a two party preferred lead of 63% to the Coalition's 37%.<sup>72</sup> The Opposition leader Kim Beazley had a seven-point lead over Howard as preferred Prime Minister according to an A.C. Nielsen poll in March and his personal approval rating was ten points higher (37 v. 47%).<sup>73</sup> Of course, the Government's woes were not due primarily or even significantly to the boats – its popularity had suffered as a result of the introduction of the GST (goods and services tax) in 2000,<sup>74</sup> rising petrol prices and the unpopular petrol excise,<sup>75</sup> the growing popularity of One Nation,<sup>76</sup> and the

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<sup>69</sup> A Newspoll survey in January placed Labor ahead on the primary vote (44 v. 42 points). See Dennis Shanahan, 'History is a Hurdle for Beazley', *The Australian*, 6 January 2001, p. 26. Other polls suggested the ALP was enjoying as much as a 10-point lead on the primary vote at the start of the year. See Peter Browne, 'Boats and Votes', *Inside Story*, 6 July 2010, <http://inside.org.au/boats-and-votes/>; accessed 19 March 2012.

<sup>70</sup> An A.C. Nielsen poll in February gave the ALP an 8 point lead (43 v. 35) on the primary vote and a 12-point lead in two party preferred terms. See Louise Dodson, 'Voters Deserting Howard', *The Age*, 13 February 2001, p. 1; Emma Macdonald, 'Howard Could Lose His Seat, Poll Shows', *Canberra Times*, 26 February 2001, p. 3.

<sup>71</sup> Bulletin-Morgan poll cited in Michelle Grattan, 'PM's Support Plunges to 30%', *Sydney Morning Herald*, 7 March 2001, p. 1; Bulletin-Morgan poll cited in Darren Gray, 'Poll Shows Coalition at 29.5%', *The Age*, 22 March 2001. Similarly, an A.C. Nielsen poll a week later found the Coalition's primary vote was at 32 per cent, the lowest level recorded by A.C. Nielsen since it began polling voting intentions in 1972. See Michael Gordon and Louise Dodson, 'Poll Shock for PM', *The Age*, 13 March 2001, p. 1.

<sup>72</sup> Morgan poll cited in Grattan, 'PM's Support Plunges to 30%', p. 1.

<sup>73</sup> A.C. Nielsen poll cited in Michelle Grattan, 'PM's Support At All-Time Low', *Sydney Morning Herald*, 13 March 2001, p. 4.

<sup>74</sup> See Tony Wright, 'Coalition Poll Slump', *The Age*, 15 February 2000, p. 1; Louise Dodson and Michael Gordon, 'Only Ten Per Cent "Better Off" Under GST', *The Age*, 14 February 2001, p. 4.

<sup>75</sup> Louise Dodson, Adrian Rollins and Andrea Carson, 'Howard Faces Poll Backlash on Petrol', *The Age*, 21 November 2000, p. 1; Gordon and Dodson, 'Poll Shock for PM', p. 1; Grattan, 'PM's Support At All-Time Low', p. 4; Antony Green, 'Libs' Primary Colours Leave Them in the Red', *Sydney Morning Herald*, 19 March 2001, p. 9.

<sup>76</sup> See Michelle Grattan and Mike Secombe, 'Poll Shows Depth of Voter Anger at Coalition', *Sydney Morning Herald*, 13 February 2001, p. 1; Paul Kelly, 'Hanson's Deadlier Than Before', *The Australian*, 14 February 2001, p. 13.



worsening state of the economy<sup>77</sup> – but its inability to control the flow of boats made the Government appear weak on a key issue. The Coalition was in need of a lifeline and the *Tampa* provided just that.

### Taking a stand

Howard later said, “I would never have imagined these events could have quite unfolded as they have. ...I didn’t want this to happen. I didn’t plan it, I didn’t design it, I didn’t time it.”<sup>78</sup> Nevertheless, he could not have hoped for a more providential set of circumstances for his Government at this time. Six boats carrying 1,212 people had already arrived in August 2001; the admission of the asylum seekers rescued by Rinnan and his crew would have brought the number of asylum seekers to an all-time monthly high of 1,650. For Howard, “[t]he *Tampa* was the beginning of the turning point. The only thing to do was to take a stand.”<sup>79</sup> Approached on his way to Parliament on 27 August by one of his ministers with her concerns about the swelling support for One Nation due to the unauthorised arrivals, Howard reportedly waved his speaking notes at her, reassuring her that this was “all about to change”.<sup>80</sup> In question time, Howard reported that he had denied the captain permission to land in Australia due to the “special circumstances” of this case. He hoped that the Government’s stance would send “a message to people smugglers and others around the world that, whilst this is a humanitarian, decent country, we are not a soft touch and we are not a nation whose sovereign rights in relation to who comes here are going to be trampled on”.<sup>81</sup>

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<sup>77</sup> David Clune, ‘Back to the Future? The November 2001 Federal Election’, *Australasian Parliamentary Review*, vol. 17, no. 1, 2002, p. 3.

<sup>78</sup> John Howard, interviewed by Charles Woolley, *60 Minutes* [TV program], Channel Nine, 2 September 2001, <https://pmtranscripts.dpmc.gov.au/release/transcript-11907>; accessed 21 September 2012.

<sup>79</sup> John Howard in the 2011 ABC TV documentary, *Leaky Boat*, produced by Victoria Pitt and Penny Chapman, [https://www.youtube.com/watch?v=3c\\_phJsx1NE](https://www.youtube.com/watch?v=3c_phJsx1NE); accessed 18 March 2015.

<sup>80</sup> Peter Van Onselen and Wayne Errington, *John Winston Howard: The Definitive Biography*, Melbourne University Press, Melbourne, 2007, pp. 300-1.

<sup>81</sup> Howard, *CDP*, HoR, 29 August 2001, p. 30235.

Thus, when Rinnan, having issued an unheeded Mayday call, proceeded to enter Australian territorial waters two days later in defiance of the orders from “the highest level”<sup>82</sup> of the Australian Government, SAS troops boarded and took control of the *Tampa* at the behest of the Government. It is worth noting that the vessels the SAS used for this purpose were not flying Australian flags; this was in order to prevent the asylum seekers from engaging Australia’s protection obligations.<sup>83</sup> That is to say, that despite using the defence of sovereignty to justify taking control of the Norwegian vessel, the Australian Government wanted to ensure that the asylum seekers on board were not able to call upon Australia’s sovereignty for the purposes of seeking asylum. The Government was deploying and denying its sovereign power at once. In reporting this “apprehended violation of Australian territorial waters”,<sup>84</sup> Howard reminded the Parliament that no country had been more generous to refugees than Australia.

After the Indochinese events of the 1970s, this country took, on a per capita basis, more Indochinese refugees than any country on earth. We have continued to be a warm, generous recipient of refugees, but we have become increasingly concerned about the increasing flow of people into this country. Every nation has the right to effectively frontal its borders and to decide who comes here and under what circumstances, and Australia has no intention of surrendering or compromising that right. We have taken this action in furtherance of that view.<sup>85</sup>

He promised the Government would “take whatever action is needed – within the law, of course – to prevent” the vessel or its passengers from landing in Australia. “Something has to be done”, Howard argued, “to stop that flow of humanity”.<sup>86</sup>

Rinnan recalled his surprise and disappointment at the Australian Government’s choice of action: “When we asked for food and medicine for the refugees, the Australians sent

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<sup>82</sup> Neville Nixon, DIMIA, to Rinnan on 27 August 2001: “the Australian Government at the highest level formally requests that you not approach Christmas Island and that you stand off at a distance at least equal to your current position”. Cited in Marr and Wilkinson, *Dark Victory*, p. 48.

<sup>83</sup> Marr and Wilkinson, *Dark Victory*, p. 81.

<sup>84</sup> John Howard, *CDP*, HoR, 29 August 2001, p. 30517.

<sup>85</sup> *Ibid.*, pp. 30517-8.

<sup>86</sup> *Ibid.*

commando troops onboard.”<sup>87</sup> The captain, who was later awarded the Nansen Refugee Award by UNHCR and named Captain of the Year by the Nautical Institute and Lloyd’s List Shipping Journal for his actions, had reason to be surprised by this response. Less than two weeks before his ship was boarded by the Australian military with a view to repelling it from Australian waters, Howard had unequivocally rejected the use of military force against asylum seekers declaring, “for a humanitarian country that really is not an option”.<sup>88</sup> When Pauline Hanson had launched One Nation’s Queensland state election campaign in February 2001 shortly after her party’s success in the Western Australian state election, she proposed a simple solution to the problem of unwanted boat arrivals: “We go out, we meet them, we fill them up with fuel, fill them up with food, give them medical supplies and we say, ‘Go that way’.”<sup>89</sup> This “solution” was popular with One Nation supporters who were fed up with “queue jumpers... coming in by the thousands”.<sup>90</sup> But according to the Prime Minister, turning back people at sea was “very harsh and unacceptable”.<sup>91</sup> Nevertheless, Howard opined, the persistent arrival of asylum seekers by boat created an “awful dilemma” for his government “of on the one hand trying to behave like a humanitarian decent country, on the other hand making certain that we don’t become just an easy touch for illegal immigrants”.<sup>92</sup>

Whereas safety of life at sea (SOLAS) considerations,<sup>93</sup> combined with Australia’s international commitments had, in the past, left the Navy with little other option than to escort or rescue asylum seeker vessels at sea and deliver them to Australian territory for

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<sup>87</sup> Arne Rinnan, captain of the *Tampa MV*, interviewed for *Norway Today*, August 2001, [http://norwaytoday.net/article\\_39.shtml](http://norwaytoday.net/article_39.shtml); accessed 19 January 2002.

<sup>88</sup> John Howard, interview with Neil Mitchell, Radio 3AW, 17 August 2001, <http://sievx.com/articles/psdp/20010817HowardInterview.html>; accessed 7 May 2015.

<sup>89</sup> One Nation leader Pauline Hanson quoted in Kevin Meade, ‘Pauline Puts Wind Up the Big Boys’, *The Australian*, 15 February 2001, p. 4.

<sup>90</sup> Hanson quoted in Steve Connolly, ‘Hanson Says Boat People Issue Helped One Nation’, *AAP*, 12 February 2001, <http://simpl012.blogspot.com.au/2012/03/qld-hanson-says-boatpeople-issue-helped.html>; accessed 26 June 2013.

<sup>91</sup> Howard, interview with Neil Mitchell, Radio 3AW, 17 August 2001, <http://sievx.com/articles/psdp/20010817HowardInterview.html>; accessed 7 May 2015.

<sup>92</sup> *Ibid.*

<sup>93</sup> Specifically the 1974 *International Convention for the Safety of Life at Sea* (SOLAS) (see Chapter V, Regulation 10, Distress Messages – Obligations and Procedures) and the 1982 *United Nations Law of the Sea Convention* (see Article 98 – Duty to Render Assistance).

processing, the rescue of the unfortunate passengers of the *Palapa 1* by the Norwegian freighter presented a unique opportunity for the Government to take a stand. As one of Howard's cabinet minister pointed out, "They're not in a leaky boat that was sinking. They're in a 60,000-tonne container ship and their lives are not in danger."<sup>94</sup> "The fortuitous circumstance of the *Tampa* rescue", as Robert Manne notes, thus "solved John Howard's dilemma. To take a decision to repel fishing boats bearing asylum seekers from Australian shores by the use of naval force was genuinely difficult from the moral point of view. To take a decision to prevent a seaworthy Norwegian cargo vessel from bringing asylum seekers to Australia was not."<sup>95</sup> Hanson's policy proposal thus became the solution to Howard's awful dilemma.

Howard insisted that the asylum seekers were the responsibility, in the first instance, of Indonesia (a non-signatory to the Refugee Convention), since they had come from Indonesia and were intercepted in that country's search and rescue zone of international waters between the two countries, or Norway, whose flag the *Tampa* sailed under.<sup>96</sup> However, the Norwegian Government rejected the idea that it had any jurisdiction over the ship let alone responsibility for the asylum seekers and insisted it was Australia's problem,<sup>97</sup> and the Indonesian President, Megawati Sukarnoputri, simply refused to answer Howard's telephone calls.<sup>98</sup> The Indonesian Government subsequently made it clear that it would not accept the asylum seekers back.<sup>99</sup> As Marr and Wilkinson note, were it to head to Indonesia, the *Tampa* would, like the *St Louis* before it, "be on a voyage to nowhere".<sup>100</sup> Rendered unseaworthy by

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<sup>94</sup> One of Howard's cabinet ministers to Michael Gordon, quoted in Michael Gordon, "The Boat that Changed it All", *Sydney Morning Herald*, 20 August 2011, <http://www.smh.com.au/national/the-boat-that-changed-it-all-20110819-1j2o2.html>; accessed 27 September 2012.

<sup>95</sup> Robert Manne, '26 August – 11 September 2001. From *Tampa* to 9/11: Seventeen Days that Changed Australia', in Martin Crotty and David Andrew Roberts (eds), *Turning Points in Australian History*, UNSW Press, Sydney, 2009, p. 241.

<sup>96</sup> Howard: "this is a matter to be resolved between the government of Indonesia and the government of Norway". *CPD*, HoR, 27 August 2001, p. 30235.

<sup>97</sup> Marr and Wilkinson, *Dark Victory*, pp. 73-4, 76-8.

<sup>98</sup> Howard, *CPD*, HoR, 30 August 2001, p. 30669.

<sup>99</sup> Marr and Wilkinson, *Dark Victory*, p. 74.

<sup>100</sup> *Ibid.*, p. 74.

the additional passengers it was woefully incapable of accommodating,<sup>101</sup> the *Tampa* was thus left stranded in the quagmire of international politics. The subsequent stalemate caused a diplomatic crisis between Australia, Indonesia and Norway, raised the ire of the UN, and garnered the attention of the world, not least because its outcome would set an important international precedent both in maritime law and asylum policy.<sup>102</sup>

### The Pacific Solution

The crisis was resolved when the Australian Government brokered a deal to outsource the processing of the asylum seekers (and all future unauthorised arrivals) to the tiny island state of Nauru, despite the fact that it was not a signatory to the UN Refugee Convention, and later Papua New Guinea's Manus Island, in exchange for financial aid.<sup>103</sup> New Zealand also accepted approximately a third of the *Tampa* asylum seekers for processing and resettlement.<sup>104</sup> This was thus touted by Howard as "a truly Pacific solution".<sup>105</sup> The Government further fortified the nation's borders by stepping up surveillance and security in the international waters between Australia and Indonesia in what was known as Operation Relex<sup>106</sup> and with a series of legislative barriers against future asylum seeking. The *Border*

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<sup>101</sup> Since it was designed to accommodate a crew of about 30 people and thus did not have lifeboats or other safety equipment for over 400 asylum seekers, the ship was effectively rendered unseaworthy. The safety of the ship and its crew and passengers was also threatened by the some of the asylum seekers' claims that they would abandon the ship if it were to set sail to Indonesia.

<sup>102</sup> Howard's refusal to admit the *Tampa* threatened to undermine maritime customs of rescuing those in peril. See Michael White, 'M/V Tampa Incident and Australia's Obligations – August 2001', *Maritime Studies*, vol. 122, 2002, pp. 7-17; Michael White, 'M/V Tampa and Christmas Island Incident, August 2001', *BIMCO Review*, London, 2002, pp. 116-21.

<sup>103</sup> In addition to paying for the establishment and operation of the processing facilities, Australia paid Nauru \$26.5 million in aid. Senate Select Committee on a Certain Maritime Incident, *A Certain Maritime Incident*, p. xliii. The Australian Government also approached East Timor, Kiribati, Fiji, Palau, Tuvalu, Tonga and France (in relation to French Polynesia) as potential host countries. *Ibid.*, pp. 293–5.

<sup>104</sup> John Howard, 'MV Tampa – Unauthorised Arrivals', media release, 1 September 2001, [http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Release/2001/media\\_release1204.html](http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Release/2001/media_release1204.html); accessed 17 September 2009.

<sup>105</sup> John Howard, press conference, Sydney, 2 September 2009, <http://pandora.nla.gov.au/pan/10052/20080118-1528/pm.gov.au/media/Interview/2001/interview1208.html>; accessed 17 September 2009.

<sup>106</sup> Operation Relex represented a change in the role of the Australian Defence Force (ADF) and the way Australia dealt with and regarded SIEVs and their passengers. The ADF had, since the late 1980s, supported Coastwatch and the Immigration Department in its border surveillance work. However, until 2001, this was limited to detecting and intercepting unauthorised boats *after* they had entered Australian territory and then transporting their passengers to Australia for processing. But with Operation Relex, the ADF became the

*Protection (Validation and Enforcement Powers) Act 2001* was designed to validate the Government's actions against the *Tampa* and in other similar situations that might arise. It created greater interdiction powers to intercept, turn around, search and detain asylum seekers attempting to enter Australia without authorisation.<sup>107</sup> The Prime Minister was circumspect about what measures and degree of force could be used to prevent unauthorised vessels to turn back intercepted boats under Operation Relex, stating only that "we do not in this country sink boats".<sup>108</sup> The *Migration Amendment (Excision from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* excised outlying Australian territories (Christmas Island, Ashmore Island, Cartier Islands and the Cocos Islands) from the migration zone, barring anyone entering Australia via these "excised offshore places" from applying for a visa to Australia without ministerial permission. "Offshore entry persons", as anyone entering the excised territories as an unlawful non-citizen was subsequently categorised, were to be taken to a "declared country" to have their claims for protection assessed.<sup>109</sup> With the creation of this new class of asylum seeker the Government was drawing a pejorative distinction between the claims of onshore asylum seekers (people applying for asylum from within Australia) and offshore entry persons – and implementing "a hierarchy of rights"<sup>110</sup> that acted to de-legitimise the asylum claims of the latter and justify the punitive measures enacted against them as part of a broader deterrence strategy. It was Coalition policy that those subsequently determined to be refugees were to be resettled in Australia only as a last resort and Howard was adamant that none of the *Tampa* refugees should end up in Australia, lest this undermine the

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leading rather than supporting agency with responsibility for detecting and repelling unauthorised vessels *before* they reached Australian waters.

<sup>107</sup> See Susan Kneebone, 'The Pacific Plan: The Provision of "Effective Protection"?', *International Journal of Refugee Law*, vol. 18, no. 3-4, 2006, p. 697.

<sup>108</sup> See Jessica Howard, 'To Deter and Deny: Australia and the Interdiction of Asylum Seekers', *Refugee*, vol. 21, no. 4, 2003, pp. 35-50; and Mark Metherell, 'Warships Sent to Boost Refugee Patrol', *Sydney Morning Herald*, 3 September 2001.

<sup>109</sup> Whereas previously asylum seekers arriving to Australian territory were known as onshore arrivals (as opposed to offshore arrivals, which referred to refugees selected for resettlement from outside of Australia), any person who enters via an "excised offshore place" thereby becoming an unlawful non-citizen is thus rendered an "offshore entry person".

<sup>110</sup> Philip Ruddock, Minister for Immigration and Multicultural Affairs, and Senator Chris Ellison, Minister for Justice and Customs, 'Government Strengthens Border Integrity', media release, 17 September 2001, <http://www.customs.gov.au/site/page.cfm?u=4221&c=3650>; accessed 18 September 2009.

Government's message.<sup>111</sup>

Together, these measures – the interdiction of boats, excision of territory and offshore processing of asylum seekers – formed the infamous and formidable Pacific Solution.<sup>112</sup> In the first instance, Operation Relex aimed to physically prevent unwanted claims of asylum by interdicting boats at sea and encouraging or forcing them to return from whence they came. By excising the most accessible territories from the Australian migration zone, the Government was able to provide a second level of defence against those who might make it through the first, legally preventing them from making onshore asylum claims in Australia, with what Susan Kneebone calls the “legal fiction” of offshore entry places and persons.<sup>113</sup> And for those who could not be denied or deterred – those who somehow made it to the Australian migration zone or could not be safely turned away – offshore processing with no guarantee of resettlement in Australia acted as the final defence and also, beneficially, as a deterrent to others who might follow. These measures were designed, according to Immigration Minister Philip Ruddock, to ensure that Australia was “meeting its obligations in relation to asylum seekers whilst also sending a clear and unambiguous message to people traffickers and those seeking a migration outcome, that we will no longer tolerate deliberate flouting of our laws and abuse of our compassion”.<sup>114</sup>

There was widespread public support for the Government's actions and its new policies for dealing with asylum seekers. The vast majority of Australians agreed with the Government's decision to refuse the *Tampa* entry into Australian waters and there was popular support for

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<sup>111</sup> Howard cited in Guy Rundle, ‘The Opportunist: John Howard and the Triumph of Reaction’, *Quarterly Essay*, no. 3, October 2001, p. 3.

<sup>112</sup> Perhaps sensitive to this label's unfortunate echo of the Nazi's ‘Final Solution’, which sealed the fate of European Jews, the Government was keen for these measures to become officially known as the Pacific Plan and, later, the Pacific Strategy. However, this semantic change was not widely adopted by the media or public. See Susan Kneebone, ‘The Pacific Plan: The Provision of “Effective Protection”?’’, *International Journal of Refugee Law*, vol. 18, no. 3-4, 2006, pp. 696-721.

<sup>113</sup> Penelope Mathew, ‘Safe for Whom? The Safe Third Country Concept Finds a Home in Australia’, in Susan Kneebone (ed.), *The Refugees Convention Fifty Years On: Globalisation and International Law*, Ashgate, Aldershot, 2003, pp.133-72.

<sup>114</sup> Ruddock and Ellison, ‘Government Strengthens Border Integrity’.

the general principle of turning away asylum seeker boats at sea.<sup>115</sup> That is to say, the Government's deployment of the military against an unarmed group of asylum seekers aboard a commercial ship that had diverted its course and delayed its business to rescue them was not viewed as an overreaction; instead, it changed the way that asylum seekers and refugees arriving by boat were viewed – not as vulnerable, needy and deserving but rather illegal, illegitimate and a threat to the nation – in turn helping to legitimise ever tougher measures against them (as outlined later in Part IV of this thesis). The sense of threat that asylum seekers evoked for Australians was exacerbated by the September 11 terrorist attacks in the United States two weeks later. Howard, who was in the United States at the time to commemorate the 50<sup>th</sup> anniversary of the signing of the ANZUS treaty, was quick to offer “Australia’s resolute solidarity”<sup>116</sup> to the Americans and – invoking the ANZUS treaty – Australia’s unconditional support for whatever “actions they take to properly retaliate in relation to these acts of bastardry against their citizens and what they stand for”.<sup>117</sup> In his election campaign launch speech the following month, Howard reminded voters they were “in a new and dangerous part of the world’s history” and that 9/11 “was an attack on Australia as much as it was an attack on the United States”.<sup>118</sup> He identified national security as a key issue on which the election would be fought and defined it as protecting the nation from the threat of terrorists and asylum seekers alike:

National security is ... about a proper response to terrorism. ... It is also about having an uncompromising view about the fundamental right of this country to protect its borders, it’s about this nation saying to the world we are a generous

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<sup>115</sup> 77% of respondents agreed with the Government’s decision to refuse entry to the *Tampa* in an A.C. Nielsen poll (cited in *Sydney Morning Herald*, 4 September 2001); 68% of respondents to a Morgan poll wanted boats carrying refugees “put back to sea” (Goot and Watson, ‘Patterns in Australian Public Opinion’, p. 36); 62% of respondents in the 2001 AES survey wanted all asylum seeker boats turned back at sea (Katharine Betts, ‘Boatpeople and Public Opinion in Australia’, *People and Place*, vol. 9, no. 4, 2001, pp. 34-48).

<sup>116</sup> John Howard, letter to President Bush, 11 September 2001, quoted in Howard, *Lazarus Rising: A Personal and Political Biography*, HarperCollins, Sydney, 2010, p. 381.

<sup>117</sup> John Howard, news conference, Washington, 11 September 2001, quoted in Howard, *Lazarus Rising*, p. 382.

<sup>118</sup> John Howard, address at the Federal Liberal Party Campaign Launch, 28 October 2001, <http://web.archive.org/web/20020523100520/http://www.pm.gov.au/news/speeches/2001/speech1311.htm>; accessed 18 June 2013.



open hearted people ... [b]ut we will decide who comes to this country and the circumstances in which they come.<sup>119</sup>

The suggestion that terrorism and asylum seeking were connected was reiterated by Defence Minister Peter Reith who repeatedly argued that “security and border protection go hand in hand” during the election campaign.<sup>120</sup> Howard subsequently claimed that he never deliberately sought to conflate asylum seeking and terrorism but proposed that the solution to both problems was the same, namely strong borders,<sup>121</sup> which, in the public’s view, the Coalition was the party most likely to deliver. According to a Newspoll conducted two weeks after the *Tampa* incident, the Government had a 19-point lead over the opposition on the question of which party they considered best able to handle immigration.<sup>122</sup> Similarly, the 2001 Australian Election Study (AES) showed that on the issue of refugees and asylum seekers, 46% preferred the Coalition compared to just 18% of voters who preferred Labor.<sup>123</sup>

Although the Coalition’s fortunes had been on the mend before *Tampa* and September 11,<sup>124</sup> there is no doubt that these events and the Government’s responses to them contributed to its remarkable comeback. Howard was unequivocal about this, stating “the additional surge for the Liberal and National parties because of their border protection policy came hard on the heels of the *Tampa* having been turned back. That was the decisive action which shifted community perceptions”.<sup>125</sup> According to A.C. Nielsen, the Coalition jumped from 47% to 57% in terms of the two party preferred vote between polls taken in early August and late September, while the ALP dropped from 53% to 43%.<sup>126</sup> By late September, Howard (57) led

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<sup>119</sup> *Ibid.*

<sup>120</sup> Peter Reith, interviewed on Network Sky TV on 13 September 2001, cited in Margo Kingston, ‘The End of Multiculturalism?’, *Sydney Morning Herald*, 13 September 2001, <http://www.smh.com.au/articles/2003/11/26/1069522651441.html>; accessed 13 September 2001.

<sup>121</sup> See Howard, *Lazarus Rising*, p. 389.

<sup>122</sup> Browne, ‘Boats and Votes’.

<sup>123</sup> AES cited in Ian McAllister, ‘Border Protection, the 2001 Australia Election and the Coalition Victory’, *Australian Journal of Political Science*, vol. 38, no. 3, 2003, p. 451.

<sup>124</sup> See Clune, ‘Back to the Future?’, p. 447.

<sup>125</sup> Howard, *Lazarus Rising*, p. 410.

<sup>126</sup> See compiled A.C. Nielsen polls cited in Clune, ‘Back to the Future?’, p. 6.

Beazley (25) by 32 points as preferred prime minister.<sup>127</sup> With his strong stance on border protection and immediate support for the United States and the ‘war on terror’ following the 9/11 attacks, Howard represented certainty and strength in a time of great uncertainty and anxiety for Australian voters. Asylum seekers, on the other hand, were viewed with even more suspicion in this strange new world. They were made to seem more foreign and dangerous by the mendacious conflation with the very terrorists they were fleeing and by claims by senior members of the Government that they would throw their own children into the ocean in an attempt to secure their entry into Australia.<sup>128</sup> “Genuine refugees don’t do that”, Howard insisted, questioning not only the humanity of the asylum seekers but also the veracity of their refugee claims on the basis of unsubstantiated evidence, “[t]hey hang on to their children”.<sup>129</sup> “I don’t want people like that in Australia”, the prime minister declared, and neither did the Australian public, despite the fact that these claims were revealed (but not admitted by the Government) to be false prior to the election.<sup>130</sup> Despite the ignoble ‘children overboard’ episode – or perhaps, indeed, because of it – the Howard Government, with its core promise to “defend our borders and ... decide who comes to this country”,<sup>131</sup> was easily re-elected on 10 November 2001.

### **Did the Pacific Solution work?**

Operation Relex intercepted 12 SIEVs between its implementation in September 2001 and the end of December that year. Four of these vessels carrying some 600 people were

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<sup>127</sup> Newspoll, 21-23 September 2001, cited in Clune, ‘Back to the Future?’, p. 7.

<sup>128</sup> The claim was first made by Minister for Immigration, Philip Ruddock, on 7 October 2001 and repeated, most notably by the Minister for Defence, Peter Reith, and the Prime Minister. Jennifer Bryant, *Investigation into Advice Provided to Ministers on ‘SIEV 4’: Report Prepared on Behalf of the People Smuggling Task Force*, Department of the Prime Minister and Cabinet, Canberra, 21 January 2002, p. 9.

<sup>129</sup> Mark Ludlow and John Hamilton, ‘Overboard: Shots Turn Away 187 But Vessel Heads In’, *Herald-Sun*, 8 October 2001.

<sup>130</sup> The Select Committee on a Certain Maritime Incident found that “the making and sustaining of the report that children had been thrown overboard from SIEV 4” was the result of “genuine miscommunication or misunderstanding, inattention, avoidance of responsibility, a public service culture of responsiveness and perhaps over-responsiveness to the political needs of ministers, and deliberate deception motivated by political expedience”. Senate Select Committee on a Certain Maritime Incident, *A Certain Maritime Incident*, pp. xxiii-xxiv.

<sup>131</sup> Howard, address at the Federal Liberal Party Campaign Launch.

successfully turned back to whence they came.<sup>132</sup> The people aboard the rest were taken to Nauru and Manus Island for processing. There were no boat arrivals in 2002 and Operation Relex was wound up early that year. The absence of boats (until the second half of 2003 and then, only in small numbers until 2009) was – and still is – taken as prima facie evidence of the success of the Pacific Solution, even by its critics.<sup>133</sup> But did the Pacific Solution work?

With respects to the *Tampa* refugees, it failed to ensure, as Howard promised, that “[t]hose people will never set foot on Australian soil”.<sup>134</sup> While New Zealand accepted the majority, 29 of the *Tampa* refugees were ultimately resettled in Australia.<sup>135</sup> In the immediate short term, at least, it also failed to deter further boat arrivals. Following the announcement and implementation of the Pacific Solution there was no decrease, but, in fact, a slight increase in boat traffic between Indonesia and Australia: there were 11 known boat departures from Indonesia to Australia between June-August 2001 prior to the *Tampa* (four in June, two in July and five in August) and twelve in the three months post-*Tampa* (three in September, seven in October and two in November) and one more in December.<sup>136</sup> Hoffman suggests that this is because “the Pacific solution was initially perceived as another form of Australian detention, but offshore”.<sup>137</sup> Ultimately, this proved to be true; of those processed and detained offshore under the Pacific Solution, 70% were found to be refugees and of these, 61% were eventually resettled in Australia and almost all of the rest (35%) in New Zealand.<sup>138</sup>

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<sup>132</sup> Cath Wilson, Assistant Secretary, Immigration Intelligence Branch, DIAC, to Marg Hutton, November 2011, <http://sievx.com/dbs/boats/SIEVS1to374.pdf>; accessed 27 January 2015.

<sup>133</sup> See, for example, Manne, ‘Comment: Asylum Seekers’; Timothy Hatton and Audrey Lim, ‘Australian Asylum Policy: The Tampa Effect’, *Agenda*, vol. 12, no. 2, 2005, p. 128; Jonathan Holmes, ‘The Pacific Solution’s Brutal Fact: We Need It’, *The Age*, 3 May 2016, <http://www.theage.com.au/comment/the-brutal-fact-of-the-pacific-solution-is-that-we-need-it-20160502-gok4sf.html>; accessed 4 May 2016.

<sup>134</sup> Howard cited in Guy Rundle, ‘The Opportunist: John Howard and the Triumph of Reaction’, *Quarterly Essay*, no. 3, October 2001, p. 3.

<sup>135</sup> UNHCR, Nauru Case Load *Tampa* Update, media backgrounder, 28 January 2005, <http://www.unhcr.org.au/pdfs/tampaupdatemediabackgrounderfinal.pdf>; 18 April 2013.

<sup>136</sup> See Sue Hoffman, ‘The Pacific Solution Myth’, *The Drum Opinion*, ABC, 22 December 2010, <http://www.abc.net.au/unleashed/42486.html>; accessed 31 March 2013.

<sup>137</sup> *Ibid.*

<sup>138</sup> Bernard Keane, ‘What Happened as a Result of TPVs and the Pacific Solution?’, *Crikey*, 6 September 2011, <http://www.crikey.com.au/2011/09/06/what-happened-as-a-result-of-tpvs-and-the-pacific-solution/>; accessed 6 September 2011.

The Pacific Solution failed as deterrence for a number of reasons. First, as Roslyn Richardson found, the “clear and unambiguous message”<sup>139</sup> the Government intended to send to asylum seekers was, for the most part, lost in translation. In her study of 27 refugees who came to Australia between 1999-2003, Richardson found that none had a detailed understanding of Australia’s asylum policies before coming to Australia and, for the vast majority, their destination was not chosen by them but for them by the people smugglers whose services they engaged.<sup>140</sup> As members of persecuted minorities, often from rural and/or impoverished backgrounds, their access to education and information was often limited such that they were reliant on family members, friends or people smugglers who themselves did not sufficiently comprehend the complicated – and ever changing – policies of destination countries in order to effectively transmit them.<sup>141</sup> The Australian Government’s message was thus being summarized, simplified, translated, edited, and altered in transmission – and received by active rather than passive audiences – if it was heard at all.<sup>142</sup> Those who did hear the Government’s message did not heed it because the prospect of prolonged detention in an Australian-run detention camp with view to eventual resettlement in a Western country was insufficient deterrence for asylum seekers fleeing real persecution in places such as Afghanistan, Iraq and Iran. As one asylum seeker explained,

[Knowing about detention] could never stop me and could stop no one. If I flee for my life I know that I will be detained for some time. I welcome the detention ... because this was a decision for life, for if you are sure that you will be killed ... [then] you will 100 per cent prefer to be detained. And of course I knew that I will be detained for maybe a month or years – I don’t know. But I won’t be killed, they won’t kill me, Australia will not kill me.<sup>143</sup>

Richardson’s findings are corroborated by those of Harriet Spinks, who also observes that, where some choice over the destination is able to be exercised, social networks and the

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<sup>139</sup> Ruddock and Ellison, ‘Government Strengthens Border Integrity’.

<sup>140</sup> Roslyn Richardson, ‘Sending a Message? Refugees and Australia’s Deterrence Campaign’, *Media International Australia*, no. 135, May 2010, p. 9.

<sup>141</sup> *Ibid.*, p. 10.

<sup>142</sup> *Ibid.*, p. 15.

<sup>143</sup> Afghan respondent, interviewed by Roslyn Richardson, 17 October 2005, cited in *ibid.*, p. 12.

knowledge or belief that a country is democratic and respects human rights and the rule of law help to decide the destination.<sup>144</sup>

What *did* work as deterrence was the very real threat of death at sea, especially after the SIEV X disaster on 19 October 2001 in which 353 people perished (see Chapter 4.1 for further discussion of this tragedy), or being pushed back to Indonesia by the Australian Navy under Operation Relex.<sup>145</sup> When a group of refugees and a people smuggler who were in Indonesia in 2001 were asked why they thought the boats stopped coming to Australia, for example, none mentioned the Pacific Solution. Instead they credited the SIEV X disaster (though a further six boats left Indonesia after the tragedy) and the policy of pushing back boats at sea.<sup>146</sup> Others point to diminishing ‘push’ factors, particularly the overthrow of the Taliban in late 2001, which “led to a period of optimism about Afghanistan’s future”,<sup>147</sup> arguing that this played a more significant role in stopping the boats than the Howard Government’s attempt to reduce ‘pull’ factors.<sup>148</sup> Indeed, the pattern of asylum seeking in Australia followed the same broad pattern as in other OECD countries, dropping away in 2002 and picking up again from 2008.<sup>149</sup> The number of asylum seekers arriving to Australia by plane (non-IMAs), who were not targeted by the policy changes, also followed this same pattern suggesting external factors rather than domestic policy changes were the primary driving factor.<sup>150</sup>

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<sup>144</sup> Harriet Spinks, ‘Destination Anywhere? Factors Affecting Asylum Seekers’ Choice of Destination Country’, research paper no. 1, 2012-13, Parliamentary Library, 5 February 2013, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2209855/upload\\_binary/2209855.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/2209855/upload_binary/2209855.pdf); accessed 15 April 2013.

<sup>145</sup> Marr and Wilkinson, *Dark Victory*, pp. 287, 129; Peter Mares, ‘The Fifth Wave’, *Inside Story*, 21 April 2009, <http://inside.org.au/the-fifth-wave/>; accessed 30 April 2009.

<sup>146</sup> Hoffman, ‘The Pacific Solution Myth’.

<sup>147</sup> William Maley, submission to the Expert Panel on Asylum Seekers, 2012, <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/MaleyW.pdf>; accessed 7 June 2013.

<sup>148</sup> William Maley, ‘Surrealist Approaches to Refugee Policy’, *Sydney Morning Herald*, 4 July 2013, <http://www.smh.com.au/federal-politics/political-opinion/surrealist-approaches-to-refugee-policy-20130703-2pc7s>; accessed 4 July 2013.

<sup>149</sup> Katie Gauthier, ‘It Takes a Bleeding Heart to See the Bleedin’ Obvious’, in Mark Davis and Miriam Lyons (eds), *More Than Luck: Ideas Australia Needs Now*, Centre for Policy Development, Sydney, 2010, p. 62. Gauthier notes small variations that might be accounted for by domestic policies.

<sup>150</sup> *Ibid.*, pp. 62-3. ummed

Nevertheless, Howard claimed that the Pacific Solution was an “outstanding success”<sup>151</sup> and, for his own political purposes, it was. The particular genius of Howard’s solution, and key to its success, was the opportunistic reframing of the asylum seeker issue into a border control and national security framework, even in the absence of any substantiated threats to national security<sup>152</sup> or a substantial illegal immigration problem like that experienced in Europe and by the United States. Asylum seekers, rather than the persecution they sought to escape, became the “problem” to be solved. Thus, policy success (or failure) could be measured by the number of potential asylum claims the Government was perceived to have prevented, repelled or rejected through its strict border control regime, rather than the number of vulnerable people for whom it was able to provide effective protection as per Australia’s obligations under the 1951 UN Refugee Convention.<sup>153</sup> Whether its success in this regard was by coincidence or design, the Pacific Solution thus served its purpose domestically, where it was perceived as a turning point in the ‘war’ against asylum seekers and in establishing a strong and ostensibly successful border protection regime.<sup>154</sup> This regime was celebrated by those who felt the Government had effectively thwarted the threat of invasion by self-selecting refugees and consequently rewarded it at the polls, and, at the same time, strongly condemned by others who felt that it represented an irrevocable and lamentable turning point in the nation’s refugee history.

### **Was *Tampa* a turning point?**

The *Tampa* incident might have been John Howard’s turning point, but was it a turning point for the nation in terms of its responses to, and treatment of, those seeking refuge within its

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<sup>151</sup> Howard quoted in Jewel Topsfield, ‘Pacific Solution “A Success” As Nauru Camp Empties’, *The Age*, 15 October 2005.

<sup>152</sup> In response to suggestions that asylum seeker boats might serve as a pathway for terrorists to enter Australia, the Director-General of ASIO Dennis Richardson made it clear that the possibility of terrorists posing as asylum seekers was remote and improbable. See Gerard Henderson, ‘Terrorists Don’t Come Via Detention Centres’, *Sydney Morning Herald*, 19 November 2002, <http://www.theage.com.au/articles/2002/11/18/1037599359073.html>; accessed 28 August 2014.

<sup>153</sup> Both the Labor party and now the Coalition have used the new arrival of boats to declare “policy failure” when in opposition. See Laurie Oakes, ‘Which Shadow Minister Plays Politics with Boatpeople?’, *The Australian*, 20 October 2009, <http://www.theaustralian.com.au/news/which-shadow-minister-plays-politics-with-boatpeople/story-e6frg71f-1225788507350>; accessed 3 February 2012.

<sup>154</sup> Errington and van Onselen, *John Winston Howard*, pp. 278-313.

borders? Certainly, it was a turning point with respects to *perceptions* of Australia. Timothy Hatton and Audrey Lim argue that the Howard Government's response to the *Tampa* "redefined Australian asylum policy in the eyes of the world".<sup>155</sup> Once known as a paragon of decency, since the turn of the millennium Australia's humanitarian reputation has become badly tarnished. With its rejection of the *Tampa* and others who would follow with the Pacific Solution measures, Australia appeared as "an arrogant white fortress and an international bully".<sup>156</sup> Under successive governments, Australia has continued along this policy trajectory and is now regarded around the globe as the "the most inhumane, the most uncaring and the most selfish of all the wealthy countries".<sup>157</sup> But while reviled, it is also admired for these very policies. The ostensible (if questionable and morally dubious) success of Howard's 'solution' to the problem of asylum seekers attracted the attention of governments all around the globe who were desperately seeking new ways of managing the increasingly difficult and growing 'problem' of asylum. In September 2001, after the Pacific Solution was established, Liberal MP Bruce Billson reported "a general mood in Europe that, thank goodness, someone is trying to do something about illegal migration" and argued that "Australia is being seen as a guiding light of action, of proactivity and of positive intervention at a national government level."<sup>158</sup>

The *Tampa* incident may have changed the way the world saw Australia, but it is the argument of this thesis that it did not change Australia's approach to asylum as such. Tough

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<sup>155</sup> Hatton and Lim, 'Australian Asylum Policy', p. 115.

<sup>156</sup> John Howard, interview with Neil Mitchell on Radio 3AW, Melbourne, 31 August 2001, <http://pmtranscripts.dpmc.gov.au/browse.php?did=12043>; accessed 26 February 2015.

<sup>157</sup> Former Liberal Prime Minister Malcolm Fraser paraphrased by Michael Gordon, 'Malcolm Fraser Savages Scott Morrison's New Asylum Seeker Laws and Senators Who Passed Them', *Sydney Morning Herald*, 10 December 2014, <http://www.smh.com.au/federal-politics/political-news/malcolm-fraser-savages-scott-morrison-s-new-asylum-seeker-laws-and-senators-who-passed-them-20141210-124bp1.html>; accessed 10 December 2016. See also Roger Cohen, 'Broken Men in Paradise', *New York Times*, 9 December 2016, <http://www.nytimes.com/2016/12/09/opinion/sunday/australia-refugee-prisons-manus-island.html>; accessed 10 December 2016; Ashley Gilbertson, 'I Am Ashamed to Be Australian', *New York Times*, <http://www.nytimes.com/2016/12/12/opinion/sunday/i-am-ashamed-to-be-australian.html>; accessed 20 December 2016; Robert Manne, 'Yes, Virginia, There is a Solution to Australia's Asylum-seeker Problem', *The Monthly*, 21 December 2016, <https://www.themonthly.com.au/blog/robert-manne/2016/21/2016/1482292818/yes-virginia-there-solution-australia-s-asylum-seeker>; accessed 21 December 2016: according to Manne, Australia is regarded as "a vicious, selfish, ruthless, and possibly racist nation among liberal-minded thinkers in every country across the globe".

<sup>158</sup> Billson, Bruce, *CPD*, HoR, 19 September 2001, p. 30961.

and cruel though it was, the Pacific Solution did not represent an aberration from an otherwise proud humanitarian record. As subsequent chapters will reveal, the *Tampa* incident was not so much a turning point as a culmination, the logical progression of a set of principles, policies, and practices designed to protect borders rather than people, and politicians' jobs rather than refugees' lives. When Captain Arne Rinnan changed his course and delayed his business to pick up the imperilled passengers of the *Palapa*, he was following maritime protocol. International maritime law was developed to ensure that people in peril would not be left to their fate upon the high seas. International refugee law was developed for the same purpose – to ensure that persecuted and displaced people would not be left to drown in the spaces between states. The evasion of Australia's responsibilities under the Refugee Convention served to undermine it. The lesson of the *Tampa* was, as William Maley identifies, that “those in dire peril should be wary of assuming that governments will hasten to their rescue”,<sup>159</sup> and that the fate of refugees lies in the hands of states and at the whim of governments just as it did before 1951.

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<sup>159</sup> Maley, *What is a Refugee?*, p. 3.



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**PART II**

**LEST WE FORGET: HISTORICAL RESPONSES TO  
REFUGEES IN AUSTRALIA 1901-1975**

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*The past is a foreign country; they do things differently there.*

L.P. Hartley, *The Go-Between*

## 2.1: ‘Characteristically Generous’? Australian Responses to Refugees Prior to 1951

In December 1938, following the annexation of Austria by Germany in March, the Evian Conference in July and the *Kristallnacht* events in November, the Australian Government pledged to accept 15,000 Jewish refugees from Europe over three years on the advice of former Prime Minister Stanley Bruce, now Australia’s High Commissioner to Britain. In doing so, the Lyons Government argued that Australia would be “play[ing] its part amongst the nations of the world” and meeting its humanitarian obligations towards “these unfortunate people”.<sup>1</sup> The London *Times* applauded this as “a characteristically generous contribution” to the refugee crisis that provided an example for other countries to follow.<sup>2</sup>

In the following chapter, published as an article in the (ERA 2010 A-ranked) *Australian Journal of Politics and History* in 2014, I show that the *Times*’ claim was prescient, as the Lyons Government’s policy was indeed characteristic, not merely of Australia’s recent past but also, more crucially, of the future asylum system of which it formed the foundations (as subsequent chapters will explore). However, while this model has become an example for other governments to follow, as the *Times* suggested it might, this characteristic contribution to the Jewish refugee crisis in 1938 was neither generous nor exemplary. In committing to take 15,000 refugees, the Lyons government was actually *reducing* rather than increasing the existing quota that had been set to limit Jewish immigration to Australia. After the war, instead of welcoming Europe’s persecuted and displaced peoples with outstretched arms, successive Australian Governments sought to actively restrict both who could come and Australia’s obligations towards them.

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<sup>1</sup> John McEwen, Minister for the Interior, ‘European Refugees: Admission to Australia’, *Commonwealth Parliamentary Debates*, House of Representatives, 1 December 1938, pp. 2535-6.

<sup>2</sup> London *Times*, cited in ‘Example for Others’, *The Argus*, 3 December 1938, p. 7.

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## **“Characteristically Generous”? Australian Responses to Refugees Prior to 1951**

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When Australia pledged to accept 15,000 Jewish refugees from Europe in 1938, it was applauded by the *London Times* as “a characteristically generous contribution” and an example for others. Australia’s reputation for generous humanitarianism was solidified after the war when it absorbed more than 180,000 of Europe’s Displaced Persons and committed to international human rights instruments designed to protect refugees and asylum seekers. This reputation has been used to both defend and critique the nation’s contemporary responses to asylum seekers. Recent Australian Prime Ministers have invoked Australia’s proud record of refugee resettlement to deflect criticism of their tough border control policies, policies which critics charge repudiate the nation’s humanitarian traditions. This article critically reviews the history of Australia’s responses to refugees and asylum seekers prior to 1951 and demonstrates that contemporary border control policies are neither a deviation from, nor defence of, a proud humanitarian record. Rather, they embody the migration management approach to refugees that provided impetus for Federation in 1901, governed Australia’s response to the Jewish refugee crisis in the 1930s, and shaped its conditional acceptance of the Displaced Persons and the position it adopted in the drafting of the United Nations Convention Relating to the Status of Refugees in 1951.

Australia is, and always has been, intensely proud of its humanitarian reputation. Compassion and generosity are central to the national identity. These values feature in the national anthem, which boasts of “boundless plains to share”, and are a requirement of Australian residence and citizenship; those applying for provisional, permanent and some temporary visas are required to sign a statement that confirms they understand that Australian values include “compassion for those in need”.<sup>1</sup> They are particularly celebrated in the nation’s immigration history, which recalls the compassion that was extended to Displaced Persons in the aftermath of the Second World War, the Indochinese welcomed in the 1970s, the Chinese who were promised protection after the Tiananmen Square Massacre in 1989, and the Kosovars offered temporary safe haven in 1999. Earlier, in 1938, when the Australian government pledged to accept 15,000 Jews who were fleeing Europe over a three-year period, the *London Times* applauded this as “a characteristically generous contribution” to the refugee crisis that provided an example for other countries to follow — praise that was reported in the Australian press.<sup>2</sup>

This humanitarian narrative has been used to both defend and criticise what might be called the punitive turn in Australia’s refugee history from 2001 onwards. In

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<sup>1</sup> Department of Immigration and Citizenship, “Australian Values Statement – Permanent and Provisional” <<http://www.immi.gov.au/living-in-australia/values/statement/long/>> accessed 18 June 2013.

<sup>2</sup> *London Times*, cited in *Argus*, 3 December 1938, p.7.

defending his “uncompromising view about the fundamental right of this country to protect its borders” and promoting his tough border protection package before the 2001 election, Prime Minister John Howard repeatedly insisted that Australians were “a generous, open-hearted people” with a “proud record” of resettling refugees at a rate second only to Canada.<sup>3</sup> The Howard government construed its policies as fitting into this tradition of generous humanitarianism by seeking to protect the integrity of the established system of refugee protection from being exploited and undermined by self-selecting refugees, who were rhetorically constructed as illegal, threatening, and undeserving of Australia’s generosity. The government argued that its system of formal resettlement went beyond Australia’s international obligations and was evidence of the nation’s “generous nature”.<sup>4</sup> The defence of this system with the Pacific Solution measures was thus, in the words of Howard’s Immigration Minister Philip Ruddock, “rational compassion”.<sup>5</sup>

Others regarded the construction and implementation of the Pacific Solution as a repudiation of this humanitarian tradition. Decrying the Coalition’s *Migration Amendment (Designated Unauthorised Arrivals) Bill* in 2006, Labor backbencher Jill Hall argued that Australia had “been a compassionate nation in the past, but [that the Howard era would] be seen as a very dark era in our history”.<sup>6</sup> Much of the contemporary commentary on refugee policy has adopted this account which presumes a “golden age” in the nation’s refugee history and conflates outcomes with intentions.<sup>7</sup> Commenting on the toxic public and political debate regarding asylum seekers that has persisted since the *Tampa* incident, the Centre for Policy Development recently argued: “It was not always this way. Leaders of the past like Ben Chifley, Arthur Calwell,

<sup>3</sup> John Howard, Address at the Federal Liberal Party Campaign Launch, 28 October 2001 <<http://web.archive.org/web/20020523100520/http://www.pm.gov.au/news/speeches/2001/speech1311.htm>>.

<sup>4</sup> Amanda Vanstone, Foreword to *Refugee and Humanitarian Issues: Australia’s Response* (Canberra, 2005), p.2.

<sup>5</sup> Philip Ruddock, “Girt By Sea – Correspondence”, *Quarterly Essay*, 6 (2002), p.97.

<sup>6</sup> Jill Hall, *Commonwealth Parliamentary Debates* (henceforth *CPD*), House of Representatives (henceforth House), 10 August 2006, p.39.

<sup>7</sup> Many commentators suggest that the punitive turn in refugee policy (beginning with Labor’s introduction of mandatory detention by some accounts or alternatively with the *Tampa* incident in 2001 by others) is a dark mark on an otherwise proud history. (See, for example, Robert Manne, “The Road to Tampa” in Laksiri Jayasuriya, David Walker and Jan Gothard, eds, *Legacies of White Australia: Race Culture and Nation* (Perth, 2003), pp.165-74; Graeme Hugo, “From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia”, *GeoJournal*, Vol. 55 (2001), pp.27-37; Andreas Schloenhardt, “To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia”, *International Journal of Refugee Law*, Vol. 14, 2-3 (2002), pp.302-28.) There are, of course, exceptions, including Mary Crock, who charts the selective nature of Australia’s generosity; Rachel Stevens who reappraises the record of the Fraser government; and Klaus Neumann and Gwenda Tavan (separately and together) who approach the archival record with historical sensitivity to construct more nuanced accounts of Australia’s immigration history. See Mary Crock, “Refugees in Australia: Of Lore, Legends and the Judicial Process”, keynote presentation at the *Annual Colloquium of the Australian Judicial Conference*, Darwin, 31 May 2003; Rachel Stevens, “Political Debates on Asylum Seekers During the Fraser Government, 1977-1982”, *Australian Journal of Politics and History*, Vol. 58, 4 (2012), pp.526-41; Klaus Neumann, *Refugee Australia: Australia’s Humanitarian Record* (Sydney, 2004); Klaus Neumann and Gwenda Tavan, eds, *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (Canberra, 2009).

Malcolm Fraser and Ian MacPhee appealed to our better angels”.<sup>8</sup> The Centre urged that Australians “should not forget” the successes of Australia’s resettlement program that had seen some 700,000 refugees become a part of the modern Australian nation, of which they could be “rightly proud”.<sup>9</sup>

I contest both of these idealised accounts. I argue that the construction of the Pacific Solution and its subsequent incarnations under Labor do not represent an aberration from an otherwise proud humanitarian record. Rather, they are the embodiment of the migration management approach to refugees that was evident before the formation of the Commonwealth Parliament in 1901 and which governed Australia’s response to the Jewish refugee crisis in the 1930s, its conditional acceptance of post-World War Displaced Persons and the position it adopted in the drafting of the United Nations Convention Relating to the Status of Refugees in 1951. A critical review of the history of Australia’s responses to refugees until 1951 demonstrates how these responses have, since the very inception of the nation, been directed by its approach to immigration in general. The conflation of the aims and objectives of these two very different policy areas has resulted in a selective approach to Australia’s humanitarian obligations that assesses people’s value before their vulnerability and privileges the protection of borders over the protection of people. It is an approach characterised by restriction, selection and control and was neatly summed up a century later by Howard’s message to the *Tampa* refugees: “we will decide who comes to this country and the circumstances in which they come”.<sup>10</sup>

### **Refugees and White Australia**

The Commonwealth government’s response to the Jewish refugee crisis in the 1930s was the first time Australia explicitly considered its obligations towards refugees. That is not to say that Australia had not received any refugees prior to the 1930s. However, until this time no distinction was made between forced and unforced migrants and there were no humanitarian provisions for the former, who instead often relied on the assistance of family, friends and volunteer organisations. Refugees simply had had to meet the standard immigration criteria of the day. Thus the first refugees to come to Australia arrived as unassisted immigrants during the nineteenth century. They included German Lutherans who fled religious persecution in Prussia and settled in South Australia in the late 1830s and early 1840s, Lebanese escaping civil conflict in the 1860s and 1890s, and Russian Jews fleeing anti-Semitism and pogroms in the 1890s.

Prior to Federation, colonial governments regulated immigration with enticements rather than restrictions. Assisted passages, for example, were offered to preferred immigrants, particularly those from the British Isles. Assisted passage schemes allowed the colonies to select the most desirable types of immigrants based on criteria such as occupation, age, gender, family status and ethnicity. Such schemes could also be easily expanded, contracted or suspended as befitting economic conditions and labour requirements at any given time. However, the discovery of gold in New South Wales in 1851 and in Victoria shortly afterwards attracted large numbers of non-British Europeans and non-Europeans, most notably the “cheap, industrious, and virtuous, but

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<sup>8</sup> Centre for Policy Development, “Prominent Australians Urge Political Leaders to Break the Stalemate on Refugees and Asylum Seekers”, 24 August 2011 <<http://cpd.org.au/2011/08/prominent-australians-urge-political-leaders-to-break-the-stalemate-on-refugees-and-asylum-seekers/>>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Howard, Address at the Federal Liberal Party Campaign Launch.

undesirable”<sup>11</sup> Chinese who provided unwanted competition on the goldfields and made up 3.3 per cent of the Australian population by 1861.<sup>12</sup> The colonial governments tried to counter the “pull” effects of the gold rush with restrictive mechanisms such as prohibitive arrival taxes and quotas. The Victorian government passed an Act in 1855 restricting the number of Chinese passengers allowed aboard ships arriving to the colony and imposed a landing fee on those passengers. This legislation was replicated by other colonies in the 1860s and 1880s. Economic recession in the 1890s increased animosity towards the Chinese and also the Pacific Islanders (known as “Kanakas”) working as indentured labourers in the Queensland sugar fields. The latter were seen as “carr[ying] with them a deplorable deterioration of the labor level and constitut[ing] a dangerous breach of social homogeneity and strength”.<sup>13</sup> Although the colonies required immigrants in order to develop their resources, “such immigrants” were regarded as “worse than none” and they introduced even stricter measures regulating their entry.<sup>14</sup>

The desire to increase control over the country’s borders and the composition of its population (that is, who could come and the manner in which they came) thus provided powerful incentive for the colonies to federate in 1901. As Alfred Deakin recalled:

No motive power operated more universally on this continent or in the beautiful island of Tasmania, and certainly no motive power operated more powerfully in dissolving the technical and arbitrary political divisions which previously separated us than the desire that we should be one people, and remain one people, without the admixture of other races.<sup>15</sup>

Accordingly, the new nation acted immediately to establish a selective and restrictive immigration policy via the *Immigration Restriction Act 1901*. Together with the *Pacific Islanders Labourers Act 1901* and various Acts that defined the citizenship rights of European and non-European migrants residing in Australia, it constituted the so-called “White Australia Policy”, which was officially endorsed by successive leaders from both sides of politics and not formally dismantled until the 1970s. The White Australia Policy was primarily devised as a means of excluding the Chinese and other immigrants from Asia, Australia’s significant Other, as well as from the Pacific region. Its effectiveness saw the proportion of non-Europeans (excluding Aboriginal Australians) in Australia’s population drop from 1.25 per cent in 1901 to just 0.21 per cent by 1947.<sup>16</sup>

From its very inception, Australia’s immigration policy was thus highly selective, tightly controlled and carefully managed. It became, as Keith Hancock prophetically argued in the 1930s, an “indispensable condition of every other Australian policy”.<sup>17</sup> Certainly, because of the initial failure to distinguish between forced and unforced

<sup>11</sup> Alfred Deakin, *CPD*, House, 12 September 1901, p.4822.

<sup>12</sup> Sing-Wu Wang, “Chinese Immigration 1840s–1890s” in James Jupp, ed., *The Australian People: An Encyclopaedia of the Nation, its People and their Origins* (Cambridge, 2001), p.199.

<sup>13</sup> Frank Parsons, “Australasian Methods of Dealing with Immigration”, *Annals of the American Academy of Political and Social Science*, Vol. 24 (July 1904), p.209.

<sup>14</sup> *Ibid.*

<sup>15</sup> Deakin quoted in Myra Willard, *History of the White Australia Policy to 1920* (Melbourne, 1923), p.119.

<sup>16</sup> Gwenda Tavan, “Long, Slow Death of White Australia”, *The Sydney Papers*, Vol. 17, 3-4 (2005), p.137. See also Marett Leiboff, “‘The Main Thing is to Shut Them Out’. The Deployment of Law and the Arrival of Russians in Australia 1913-1925: An Histoire”, *Law Text Culture*, Vol. 15 (2011), pp.233-68.

<sup>17</sup> Keith Hancock, *Australia* (Melbourne, 1930), p.59.



migrants and the subsequent conflation of the objectives of policies created to deal with each of these cohorts, the White Australia Policy shaped the nation’s responses to immigrants and refugees alike and, in doing so, shaped the nation.

Australia’s neglect of refugee policy after Federation was not mere oversight. It was necessary to preserve its discriminatory immigration policies and desired cultural homogeneity, which would, by definition, be compromised by agreeing to accept refugees on an unpredictable humanitarian basis. Hence, although Australia was a founding member of the League of Nations from 1919, Prime Minister Billy Hughes was reported to be “the smallest but the most outspoken of all the delegates at the Peace Conference” in Versailles because of his opposition to the inclusion of a racial equality clause in the Treaty establishing the League.<sup>18</sup> Proposed by the Japanese and widely supported by other delegations, this clause would have obliged signatories to refrain from “discriminat[ing], either in law or in fact, against any person or persons on account of his or her race or nationality”.<sup>19</sup> Hughes fiercely — and effectively — opposed it. As he recounted,

in the congenial atmosphere of the polyglot Conference, the idea of an ‘open door’ through which all the nations of the earth could come and go at will, and perhaps find an unrestricted market for their goods, developed apace, and the difficulty was not to find those who thought the proposal wise and good, but those who turned a resolute back upon its meretricious glitter. And this went so far that the representatives of Australia seemed to be almost isolated, a tiny patch of white in a great sea of colour.<sup>20</sup>

The Treaty of Versailles was the first international political treaty that Australia directly negotiated and signed independently of Britain and represented a significant step towards sovereign nationhood. Australia’s obstructionist role during the negotiations was therefore a defining stance for the nation, a portent of Australia’s reluctant internationalism, at least with respect to refugee protection. It was unsurprising, then, that Australia contributed only marginally to the League’s efforts to resettle the Russian, and later Armenian, refugees in the interwar period, the first concerted effort at international cooperation with regards to refugees. Russian and Armenian refugees were required to be nominated by Australian-based friends or relatives and to obtain special permission to enter Australia via its general immigration program. No financial assistance was provided by the Australian government. As a result, no more than a few thousand were accepted.<sup>21</sup> Such was the conflation of asylum with immigration at that time that, when asked in 1921 by the British Secretary of State for the Colonies to provide refuge to some of the 40,000 Ukrainian Jews who had fled to Poland (whose government was refusing to accept any more refugees unless their onward emigration could be guaranteed), the Australian government politely declined on the grounds that its immigration requirements were being sufficiently “met by the immigration of [British] ex-service men whose passages were being paid by the British government”.<sup>22</sup>

<sup>18</sup> Vernon Bartlett, *Behind the Scenes at the Peace Conference* (London, 1919), p.25.

<sup>19</sup> Morinosuke Kajima, *The Diplomacy of Japan, 1894-1922, Volume III, First World War, Paris Peace Conference, Washington Conference* (Tokyo, 1980), p.396.

<sup>20</sup> William Hughes, *The Splendid Adventure: A Review of Empire Relations Within and Without the Commonwealth of Britannic Nations* (London, 1929), pp.107-8.

<sup>21</sup> Percy Deane, Australian Prime Minister’s Secretary to the Secretary General of the League of Nations, 30 April 1924, National Archives of Australia (henceforth NAA), A981, 178527.

<sup>22</sup> Cable from Prime Minister’s Department to the High Commissioner’s Office, 1 June 1921, NAA, A434, 49/3/3196.

The repatriation and resettlement of refugees was conducted under the auspices of the High Commission for Refugees established by the League in June 1921 and headed by Fridtjof Nansen. Though it agreed to recognise the identity certificates (Nansen passports) issued to the refugees, Australia, protected as it was from obligations towards the refugees both by distance and its discriminatory immigration policies, regarded the refugees as an exclusively European problem and the measures to alleviate their predicament as of little relevance to Australia.<sup>23</sup> Anticipating “great difficulties in the way of our co-operating in any migration scheme connected with these refugees”,<sup>24</sup> Prime Minister Stanley Bruce avoided the 1926 intergovernmental conference convened by the League to address the refugee issue. He did so on the advice of the Australian High Commissioner in London, former Prime Minister Joseph Cook, who saw “[n]o special reasons for our being there”.<sup>25</sup>

### The Jewish Crisis

Avoidance was also the approach adopted by the Lyons government with respect to the developing Jewish refugee crisis after Hitler’s rise to power in January 1933. Warned in June of a potential flood of Jews who might seek to migrate to Australia as a result of escalating persecution in their homeland, in October Lyons declined to sign the 1933 League of Nations Convention Relating to the International Status of Refugees, which enshrined the key principle of refugee protection, *non-refoulement*, and would later serve as a model for the 1951 UN Refugee Convention. This meant that Australia was not bound by any formal commitments to refugee protection. Despite the imperative to build the population in the aftermath of the Depression, a period in which immigration was severely restricted and the birth rate dropped such that “ultimate decline in population [was] predicted with assurance”,<sup>26</sup> the government refused to acknowledge any complementarity between the population needs of Australia and the protection needs of the German Jews. The Jews were white aliens first and foremost and thus perceived as a threat to both British culture and Australian workers who were still recovering from the effects of the Depression. They were, furthermore, regarded as undesirable migrants “for the reason that they do not assimilate”.<sup>27</sup> As a consequence the government was not prepared to consider block nominations of Jews on humanitarian grounds.

Not only was it decided that no “special facilities should be given for Jews from Germany to migrate to Australia”, it was further suggested that “whilst there would appear to be no serious objection to granting applications for landing permits in cases where the applicants clearly come within the approved categories of close relatives which apply to aliens generally, *it may be felt desirable to take special precautions against all other classes of applicants*”.<sup>28</sup> Ultimately, special precautions proved

<sup>23</sup> See letter from Acting Prime Minister Joseph Cook to the Secretary-General of the League of Nations, 26 May 1921, NAA, A981 LEAGUE REFU 2 PART 1.

<sup>24</sup> Cable from Prime Minister Stanley Bruce to the Australian High Commissioner in London, Sir Joseph Cook, 22 April 1926, NAA, A981, LEAGUE REFU 2 PART 1.

<sup>25</sup> Cable from Cook to Bruce, 23 April 1926, NAA, A981, LEAGUE REFU 2 PART 1.

<sup>26</sup> See S.H. Wolstenholme, “The Future of the Australian Population” [1937], *Economic Record*, Vol. 12, 1-2 (1937), p.195.

<sup>27</sup> M. Garrett, “Question of Admission of Jews into Australia” [memo], 6 August 1936, NAA, A434, 1949/3/7034.

<sup>28</sup> J.A. Perkins, “Question of Admission of Jews from Germany” [memo for cabinet], 2 June 1933, NAA, A434, 1949/3/7034 [emphasis added].

unnecessary. The existing restrictions limiting admission to dependent relatives of existing residents or those possessing £500 landing money proved fairly robust barriers to the German Jews, whose government prohibited them from leaving with sufficient capital to meet the exorbitant landing money requirements.<sup>29</sup> In effect, the doors were effectively closed to humanitarian entrants with access via a limited migration pathway only.

Jewish advocacy organisations won a small concession in 1936 when the government agreed to reduce the landing money from £500 to £50 for migrants with a local guarantor, to £200 for those without, and to allow organisations to act as sponsors.<sup>30</sup> However Michael Blakeney suggests that this was not done out of a sense of compassion for the refugees so much as political pragmatism. The immigration restrictions were working *too* well and this reduction in landing money “was not to make it easier for Jewish refugees to enter Australia, but rather to facilitate a measure of acceptable white alien immigration from amongst those who could afford it and were attractive to the Commonwealth”, particularly those from Northern Europe.<sup>31</sup> Nevertheless, this concession had significant ramifications after the annexation of Austria in March 1938, which precipitated an exponential increase in applications from Jews to come to Australia.<sup>32</sup> The government announced that “each case [would] be considered on its merits, upon application in the usual form to the Department of the Interior”.<sup>33</sup> However, cognisant of the fact that the vast majority of these — some 20,000 — would be able to meet the immigration criteria (particularly with the assistance of organisational sponsors), Cabinet decided in June 1938 to set a quota of 5,100 Jewish migrants per year in order to pre-emptively limit the number of Jews entering Australia.<sup>34</sup>

In July Australia sent a delegation to the Evian Conference convened by US President Roosevelt. Australia’s participation was premised on the proviso that that no country would be expected to receive a greater number of immigrants than was already permitted by its existing immigration legislation.<sup>35</sup> Australia’s representative, Lieutenant Colonel Thomas Walter White, argued that Australia could do no more to assist refugees than it was already doing by admitting a limited number through its existing immigration program.<sup>36</sup> In fact, it would do less. Australia’s High Commissioner to Britain, former Prime Minister Stanley Bruce, had suggested that Australia take 30,000 refugees, arguing that this act of generosity “would greatly increase, particularly in the United States, the goodwill towards and the prestige of Australia”.<sup>37</sup> However when the Lyons government announced in December 1938 its intention to accept 15,000 refugees over three years, it not only halved the figure proposed by Bruce, but also *reduced* the existing quota set in June to limit Jewish

<sup>29</sup> See Paul Bartrop, *Australia and the Holocaust, 1933-45* (Melbourne, 1994), p.28.

<sup>30</sup> Department of the Interior, “Question of Admission of Jews into Australia” [memo, no. 33/4668], NAA, A434, 1949/3/7034.

<sup>31</sup> Michael Blakeney, *Australia and the Jewish Refugees, 1933-1948* (Sydney, 1985), pp.29-31.

<sup>32</sup> *Ibid.*, p.50.

<sup>33</sup> John McEwen, *CPD*, House, 4 May 1938, p.784.

<sup>34</sup> See Klaus Neumann, *Refuge Australia: Australia’s Humanitarian Record* (Sydney, 2004), pp.15-16.

<sup>35</sup> Cable from High Commissioner Stanley Bruce to Prime Minister Joseph Lyons, 5 April 1938, NAA, A461, M349/3/5.

<sup>36</sup> Thomas W. White, *Proceedings of the International Conference, Evian, July 1938*.

<sup>37</sup> Cable from Bruce to Lyons, 21 November 1938, NAA, A433 1943/2/46.

immigration, by 100 places. This new quota was not dedicated exclusively to Jewish refugees but also included Aryan and non-Aryan Christian refugees.

Although it duly noted that “the refugee problem is one quite apart from the general question of immigration, in that it deals with the specific question of the amelioration of the conditions of oppressed people”,<sup>38</sup> the government did not offer refuge as such to the European Jews, who were viewed as “not a problem for Australia, but for Europe”.<sup>39</sup> Rather they were to be admitted selectively according to immigration criteria for white aliens. The Minister for the Interior, John McEwen, made it clear that the government would not be swayed by the poignancy of individual cases.<sup>40</sup> To the contrary, he promised that the government would only admit those who would fill or fit the needs of the national labour market. Furthermore, despite the desperate situation in Europe, the government suggested that if the Jews were unable to bring some capital with them, they were likely to be rejected. By its own admission, the government was not only considering the interests of the existing population but also those of “the people of British race who desire to establish themselves in Australia”,<sup>41</sup> that is to say, it placed the interests of potential privileged migrants above the needs of these very real refugees facing immediate persecution. This policy had the support of the opposition with the Labor leader, John Curtin, declaring it “a perfectly sound arrangement”.<sup>42</sup> However, the government need not have worried; less than 7,500 Jews arrived before the Second World War intervened.

### **Populate (with the right kind) or Perish**

Even in the aftermath of the war, when the atrocities perpetrated by the Nazis were well documented, Australia remained reluctant to open its doors to Jewish refugees. Despite the urgent need to increase the population for economic and security reasons, the Chifley Labor government remained determined to carefully plan, select and control the composition of its population. This was evidenced by the establishment of a Department of Immigration in August 1945, with Arthur Calwell as its first Minister. In line with long-held official views that population was the antidote to Australia’s sense of vulnerability, Calwell set about implementing an ambitious immigration program to supplement the insufficient birth rate of the nation. He envisaged a 2 per cent increase in population per year, half of which would be provided by “natural increase” (the excess of births over deaths), the other half by immigration. Using the spectre of further conflict,<sup>43</sup> he called on all Australians to embrace this ambitious program to populate or else perish, suggesting that “without adequate numbers this wide brown land may not be held in another clash of arms”.<sup>44</sup>

However, it was not just immigrants that Australia urgently needed, but the “*right type of immigrants*”.<sup>45</sup> Non-Europeans who had been granted refuge during the war — even those who had married and established businesses in the meantime — were aggressively repatriated. Calwell’s scheme continued to favour British migrants (“the

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<sup>38</sup> John McEwen, *CPD*, House, 1 December 1938, p.2535.

<sup>39</sup> *Argus*, 17 November 1938, p.12.

<sup>40</sup> John McEwen, *CPD*, House, 1 December 1938, pp.2534-6.

<sup>41</sup> *CPD*, House, 1 December 1938, p.2535.

<sup>42</sup> *Ibid.*, p.2536.

<sup>43</sup> Arthur Calwell, *CPD*, House, 2 August 1945, pp.4911-5.

<sup>44</sup> *Ibid.*, 22 November 1946, p.511. Calwell’s plans were detailed in *How Many Australians Tomorrow?* (Melbourne, 1945).

<sup>45</sup> *Ibid.*, p.502.

best possible immigrant types”<sup>46</sup>) providing free passages for ex-servicemen and their families and subsidised passages for civilians (who became known as the £10 Poms).<sup>47</sup> Nevertheless, it was clear from the beginning that the preferred British immigrants would not alone be sufficient to meet the needs of post-war Australia and that the net would need to be cast more broadly.<sup>48</sup> Thus Calwell promoted the idea of Australia “becoming a melting pot of races with a population like America”.<sup>49</sup> He was not, however, imagining that migrants would come from further afield than Europe. The mass migration scheme was not intended to undermine White Australia, but to sustain it, with the shortfall being made up by “fair-haired, handsome, blue-eyed Balts [...] accustomed to relatively high standards of living”<sup>50</sup> and, if necessary, Southern Europeans. This ambitious migration program enjoyed bipartisan support.

Despite the urgent need to populate, acceptance of the need to widen the pool of potential immigrants, and strong bipartisan support for it migration program, the government approached Jewish migration cautiously, having observed how the pre-war entrants had “settled in Sydney and Melbourne and soon became conspicuous by their tendency to acquire property and settle in particular districts”.<sup>51</sup> Like the Chinese before them, they were seen as dangerously hardworking and willing to work for a pittance in deplorable conditions, and thus a threat to local labour and living standards.<sup>52</sup> Calwell introduced a Close Relatives Reunion Scheme in August 1945; however it was essentially just the continuation of the government’s pre-war policy, namely, “the admission of a limited number of these people, provided they are nominated by relatives in Australia who are in a position and willing to accommodate and maintain them”,<sup>53</sup> but with more limited quotas. Citing changed circumstances, the pre-war annual quota of 5,000 humanitarian entrants per year was abandoned and replaced by the more restrictive quota of 2,000 in the first year from August 1945.<sup>54</sup>

Even so, public resistance towards the Jewish refugees remained strong and was fanned by the media, which warned of Australia being flooded with Jewish refugees who would not assimilate, would endanger living and working standards, and might be Communists, terrorists or criminals.<sup>55</sup> It was suggested that the refugees arriving as part of this limited family reunion program were receiving preferential treatment to returning Australians and British migrants with respect to their passage to and housing in Australia, drawing the ire of groups like the Returned Servicemen’s League.<sup>56</sup> In fact, British ships were reserved for Australians and the British, leaving the Jews reliant on the limited and typically substandard non-British private shipping. Housing

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<sup>46</sup> *Ibid.*, p.503.

<sup>47</sup> See Arthur Calwell, *CPD*, House, 2 August 1945, p.4913.

<sup>48</sup> See *Mercury*, 26 July 1947, p.2.

<sup>49</sup> Arthur Calwell paraphrased in *Advocate* [Burnie], 9 February 1945, p.5.

<sup>50</sup> “Letter to the Editor”, *Herald* [Melbourne], 25 July 1947.

<sup>51</sup> Department of External Affairs, “Post-War Migration” [memo], 21 September 1944, cited in Suzanne Rutland, “Postwar Anti-Jewish Refugee Hysteria: A Case of Racial or Religious Bigotry?”, *Journal of Australian Studies*, Vol. 77 (2003), pp 69-79.

<sup>52</sup> See Suzanne Rutland, “‘The Unwanted’: Pre and Post World War II Migration to Australia”, *Yalkut Moreshet*, 2 (Winter 2006), p.17.

<sup>53</sup> Arthur Calwell, *CPD*, House, 22 November 1946, p.507.

<sup>54</sup> Rutland, “Postwar Anti-Jewish Refugee Hysteria”, pp.69-79.

<sup>55</sup> See *Townsville Daily Bulletin*, 17 March 1948, p.2; Rutland, “Postwar Anti-Jewish Refugee Hysteria”, pp.72-4.

<sup>56</sup> *Advertiser*, 24 February 1947, p.1.

and other support services provided for them were supplied by the Australian Jewish Welfare Society and other Jewish organisations, who relied on international sources for their funding.<sup>57</sup> Regarding himself “merely as the custodian of the rights of the Australian people in the matter of immigration”,<sup>58</sup> Calwell nevertheless responded to these fears of floods of inassimilable Jewish immigrants. In mid-1946 he revived an old measure that had been used against Chinese immigrants, enacting quotas restricting the number of Jewish passengers allowed on ships coming to Australia to 25 per cent of the total passenger list.<sup>59</sup> This proved additionally prohibitive as Jewish immigration agents found it difficult to find non-Jewish passengers willing to travel on the refugee boats and make up the other 75 per cent of berths.<sup>60</sup> When they later began using chartered flights instead, Calwell extended the restriction to planes.<sup>61</sup> According to Calwell such restrictions were not an expression of official anti-Semitism. Rather they were a politically pragmatic response to public anti-Semitism. As he later explained: “We had to insist that half the accommodation in these wretched vessels must be sold to non-Jewish people. It would have created a great wave of anti-Semitism and would have been electorally disastrous for the Labor Party had we not made this decision”.<sup>62</sup>

Fearing that public resentment caused by a perceived lack of control over Australia’s borders and population might undermine the broader migration program, Calwell announced an end to the humanitarian reunion scheme in January 1947. As he explained, “[t]he Government feels that it has gone as far as it can reasonably be expected to go for the present in granting landing permits [...] purely on humanitarian grounds”, that is, that Australia had done its “fair share”. He declared that henceforth “the approval of applications [would] be more selective from the point of view of the intending migrants’ ability to contribute to Australia’s economic welfare, with particular regard to their ages and proficiency in those skilled occupations where there is a marked shortage of labour”.<sup>63</sup>

The post-war British assisted passage scheme commenced on 31 March 1947. As noted, it was never expected to alone provide enough immigrants to meet the desired population increase due, in part, to the severely limited shipping.<sup>64</sup> Calwell also suggested that British migrants would not be willing to suffer the conditions aboard troopships nor to work as needed on construction projects in remote locations and live in camp conditions.<sup>65</sup> Having rejected a proposal from the United Nations Relief and Rehabilitation Administration (UNRRA) in early 1947 to resettle 30,000 refugees, the government instead turned to the International Refugee Organisation (IRO) to help meet this shortfall.<sup>66</sup> The IRO had been established in 1946 to take over from UNRRA the task of resolving the post-war refugee crisis. It required a minimum of fifteen

<sup>57</sup> Rutland, “The Unwanted”, pp.14, 22; Rutland, “Postwar Anti-Jewish Refugee Hysteria”, p.77.

<sup>58</sup> Arthur Calwell, *CPD*, House, 6 October 1948, p.1282.

<sup>59</sup> Suzanne Rutland, “Jewish Refugee and Post-War Immigration” in James Jupp, ed., *The Australian People: An Encyclopaedia of the Nation, its People and their Origins* (Cambridge, 2001), p.537.

<sup>60</sup> See Rutland, “The Unwanted”, p.23.

<sup>61</sup> See Rutland, “Jewish Refugee and Post-War Immigration”, p.537.

<sup>62</sup> Arthur Calwell, quoted in Graham Freudenberg, “Calwell, Arthur Augustus (1896-1973)”, *Australian Dictionary of Biography* <<http://adbonline.anu.edu.au/biogs/A130385b.htm>>

<sup>63</sup> Arthur Calwell, Ministerial Statement: “Refugees and Displaced Persons”, 23 January 1947, NAA, A434 1947/3/4805.

<sup>64</sup> *Canberra Times*, 6 April 1946, p.2.

<sup>65</sup> See *Mercury*, 26 July 1947, p.2.

<sup>66</sup> Neumann, *Refugee Australia*, p.29.

member nations to bring its constitution into force. Whereas UNRRA had been mostly concerned with repatriation, the IRO was left with the task of resettling those who could not, or would not be repatriated. Rather than making humanitarian appeals as the UNRRA had done, the IRO instead pitched the Displaced Persons (DPs) as potential workers to an international community desperately short of labourers and offered to fund their migration to receiving countries. The IRO therefore provided the opportunity to very cheaply bolster the population with carefully selected migrants. At the same time, it was noted that Australia’s participation in the IRO “would be widely acclaimed” since its signature and contribution would help bring the organisation into being.<sup>67</sup>

Despite the wide acclaim both then and since, Australia’s Displaced Persons Scheme was designed explicitly to meet national rather than humanitarian interests. When it joined the IRO in May 1947, the Australian government made clear that its “[p]articipation would not involve us in commitments to take refugees into the country, our freedom in this regard being unimpaired”.<sup>68</sup> The subsequent agreement with the IRO stipulated that the Australian government could individually select the DPs (whom it tellingly referred to as “desirable immigrants”) according to its own selection criteria.<sup>69</sup> Calwell promised that “[e]verything possible will be done in our immigration plans to bring to Australia a large number of adult male workers to do a lot of hard manual work, and also a number of marriageable females in order that the perpetuation of the splendid Australian people shall be made possible”.<sup>70</sup> Australian selection teams in Europe were responsible for selecting healthy, young and preferably single displaced persons who were willing to work for two years in remote and industrial locations, after which they would settle easily into the community. Potential entrants had to submit to thorough medical examinations and those who were discovered to be harbouring any serious ailment were rejected. Later, the criteria were tightened and selection officers were instructed to reject even those suffering from minor complaints such as bad teeth or tinea.<sup>71</sup> Although the agreement with the IRO explicitly stated that the selection of immigrants was to be carried out without discrimination on the grounds of race or religion, there was also an unofficial racial hierarchy, which favoured “clear skinned, sun-bronzed, flaxen-haired”<sup>72</sup> Balts. This was crucial for the maintenance of White Australia, since the agreement guaranteed the DPs the same rights and liberties granted to foreigners resident in Australia and recognised their right to apply for Australian citizenship.<sup>73</sup> Despite assurances from Calwell to the contrary, Jews, who were required to declare their Jewish heritage on their immigration applications, were

<sup>67</sup> Cabinet Submission by Ben Chifley and Herbert Evatt, “Australian Participation in the International Refugee Organisation and Post-UNRRA Relief”, 10 May 1947  
<<http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/vVolume/C0D5DA9434086DFCCA256B7E007F7B81>>.

<sup>68</sup> Ben Chifley and Herbert Evatt, agendum no. 6950, n.d. (approved by Cabinet 13 May 1947), NAA, A2700 695D.

<sup>69</sup> Arthur Calwell, “Agreement with the International Refugee Organisation”, 21 July 1947, published by DFAT, Historical Documents, no. 283  
<<http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/d30d79e4ab5621f9ca256c8600163c0d/34de11e5815c539dca256b7e00810cb6?OpenDocument>>.

<sup>70</sup> Arthur Calwell, *CPD*, House, 5 June 1947, p.3557.

<sup>71</sup> A.J. Metcalfe to Senior Medical Office, 1 February 1949, cited in Neumann, *Refugee Australia*, p.33.

<sup>72</sup> *Herald* [Melbourne], 8 December 1947.

<sup>73</sup> Calwell, “Agreement with the International Refugee Organisation”.

all but excluded from the scheme. Only young, single, “exceptionally good cases” who would commit to go to remote areas were accepted and, as Rutland points out, these made up just 250-500 of the more than 180,000 people who ultimately came via the scheme.<sup>74</sup> The careful selection of the migrants was crucial to its success and its continuation and expansion. “[S]o impressed” was the government, “with the type of European migrants” it had received “and their ready reception in Australia” that its initial commitment to take 12,000 Displaced Persons was increased to 20,000 per annum a year later, contingent upon the availability of sufficient shipping.<sup>75</sup> In 1949, the quota was again increased to 50,000 and doubled the following year under the Menzies government, making it a bipartisan scheme.

At the same time as he was welcoming these “splendid types” to Australia, Calwell was busy excluding other, less desirable types. Some 15,000 evacuees fleeing the Japanese in the Pacific had been given refuge in Australia for the duration of the war. Of these, 5,473 were non-Europeans (Indonesians, Chinese and Malays).<sup>76</sup> Just like the Pacific Islanders at the turn of the century who were deported under the *Pacific Island Labourers Act 1901*, their presence in Australia had been tolerated because it was perceived as temporary. As Calwell told the Parliament in 1949: “We were glad, in the interests of humanity, to give them refuge in Australia while the war lasted, but there was never any doubt that they were to return to their own countries afterwards”.<sup>77</sup> While most did return to their home countries, some, who had married and/or established businesses in the interim, resisted. These remaining non-European wartime refugees proved a problem for Calwell as they undermined the White Australia Policy and the government’s perceived ability to control its borders. In 1948, the Government enacted the *Aliens Deportation Act* to deal with “the hard core of resisters”.<sup>78</sup> This was successfully challenged in the High Court the following year by Annie O’Keefe, an Ambonese woman with eight children who had come to Australia with her husband in 1942. Although she had later married an Australian man after her husband had died, O’Keefe was nevertheless ordered to leave Australia after the war. Her case attracted public sympathy and won the support of the opposition, who (with an eye to the election later that year) claimed to have more sympathy for humanitarian cases like Mrs O’Keefe’s.<sup>79</sup> According to Calwell, the danger was that an exception in this case would establish a precedent that would effectively “open the flood gates to any Asiatics who want to come” to Australia.<sup>80</sup> In Calwell’s view, the High Court ruling in this case effectively “knock[ed] down the pillars upon which the White Australia Policy [had] firmly rested since 1901”.<sup>81</sup> He hastily proposed amendments to plug the legal holes

<sup>74</sup> Rutland, “Jewish Refugee and Post-War Immigration”, p.537.

<sup>75</sup> “Immigration Policy and Planning”, 12 July 1948, NAA, CP815/1 021.144, pp.63-8; and Arthur Calwell, “Migration as a Source of Farm Labour”, 9 March 1948  
<[http://www.immi.gov.au/about/anniversary/\\_pdf/03-statements-vol2-farm-labour.pdf](http://www.immi.gov.au/about/anniversary/_pdf/03-statements-vol2-farm-labour.pdf)>.

<sup>76</sup> Arthur Calwell, *CPD*, House, 9 February 1949, p.60.

<sup>77</sup> *Ibid.*

<sup>78</sup> Arthur Calwell, “Proposed Amendment of the Immigration Act”, cabinet submission, 31 March 1949

<<http://www.info.dfat.gov.au/info/historical/HistDocs.nsf/d30d79e4ab5621f9ca256c8600163c0d/6b0bb38b3bdfd6afca256b7f000a9d49?OpenDocument>>.

<sup>79</sup> Harold Holt, *CPD*, House, 9 February 1949, p.57.

<sup>80</sup> Arthur Calwell, *CPD*, House, 9 February 1949, p.63.

<sup>81</sup> Arthur Calwell, address to the Australian Natives’ Association, 23 March 1949, reproduced in *Australian Outlook*, Vol. 3, 2 (1949), pp.134-6.



and subsequently introduced the *War-Time Refugees Removal Act 1949*, which would have allowed him to deport the O’Keefe family and others like them.<sup>82</sup> As he declared, nothing would deter him “from giving effect to the expressed will of the people of this country who alone have the right to determine who shall be admitted to our shores and on what conditions they may be permitted to remain”.<sup>83</sup>

Nothing, it would seem, except an election. On 19 December 1949, before Calwell had a chance to deport Annie O’Keefe and her family, the Chifley-led Labor Party lost government to the Liberal Party led by Robert Menzies. Menzies’ Immigration Minister, Harold Holt, adopted a more liberal approach towards the remaining wartime refugees and allowed them to stay permanently. Under the Liberal Attitude Status policy, he also granted residence to about 600 Chinese students reluctant to return home after mainland China fell to the Communists. Ideological differences trumped the White Australia Policy (which the Menzies government strongly supported<sup>84</sup>) on this occasion. The Liberal Attitude Status permit holders were subject to the same conditions as the War Time Refugee permit holders, they were ineligible for naturalisation and were not allowed to sponsor spouses, children or assistants.

Holt continued the Displaced Persons Scheme that Calwell had begun. In total, 181,700 Displaced Persons arrived in Australia under the scheme between 1947 and 1951.<sup>85</sup> According to the scheme’s architect, “no other country faced up to its task, nor did more for those who came to seek its citizenship, than did Australia”.<sup>86</sup> Similarly, Holt boasted in 1953 that Australians could “feel justifiable pride as a people in the way our new settlers have been received and have gradually become absorbed. No country”, he claimed, could “point to a better record in the humanitarian task of taking in the Displaced Persons of Europe.”<sup>87</sup> But these claims obscure the fact that the scheme was never a humanitarian endeavour. The Displaced Persons who came to Australia were not welcomed as refugees but as migrant workers who were required to undertake indentured labour in remote locations under difficult conditions before they qualified for permanent residence. They were carefully vetted to suit Australia’s racial, aesthetic, and cultural preferences and to fit its labour needs while the most needy amongst them were *actively* excluded.

### International Obligations

Active resistance to any obligation towards undesirable refugees has been a constant theme in Australia’s history. The Chifley government had fought to maintain the right to select only the most useful and suitable refugees during the drafting of the Universal Declaration of Human Rights in 1948, arguing against the inclusion of the right to asylum.<sup>88</sup> While it acknowledged the individual’s right “to *seek and enjoy* asylum” and supported the principle of *non-refoulement*, the Australian government did not support the right of those seeking asylum “to *enter* another country irrespective of their

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<sup>82</sup> Calwell, “Proposed Amendment of the Immigration Act”.

<sup>83</sup> Arthur Calwell to W.G. Coughlan, Chairman of the Australian Citizens’ Committee for the Defence of Chinese Residents, 7 October 1949, NAA, A1838 932/1/1.

<sup>84</sup> See, for example, comments by Menzies in *CPD*, House, 16 June 1949, pp.1134-40.

<sup>85</sup> Graeme Hugo, “From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia”, *GeoJournal*, Vol. 55 (2001), p.27.

<sup>86</sup> Arthur Calwell, “The Why and How of Post-War Immigration” in Harold Holt *et al.*, eds, *Australia and the Migrant* (Sydney, 1953), p.10.

<sup>87</sup> Harold Holt, “Introduction” in Holt, *et al.*, eds, *Australia and the Migrant*, p.6.

<sup>88</sup> Brennan, *Tampering with Asylum*, pp.1-2.

suitability as settlers”, that is, the obligation on the part of signatory states to *admit* refugees.<sup>89</sup> As Head of the Department of Immigration Tasman Heyes argued, this “would be tantamount to the abandonment of the right which every sovereign state possesses to determine the composition of its own population, and who shall be admitted to its territories”.<sup>90</sup>

This refrain was taken up by the Menzies government when it came to the 1951 UN Convention Relating to the Status of Refugees. Australia was not involved in, nor impressed by, the initial drafting of the Convention. As Heyes’ assistant, John Horgan declared: “It is rather ridiculous to ask any State to subscribe to a convention which would deter it from imposing a penalty on an undesirable refugee who deliberately flouted its immigration law. To my mind it would be a definite step towards abandoning effective control over immigration.”<sup>91</sup> Seeing little hope that its objections to the text would be heard and concerned that they might draw unwanted attention to, and criticism of, the White Australia Policy, Australia very nearly did not participate in the Conference of Plenipotentiaries at Geneva in July 1951 where the Convention was finalised and adopted. For these very reasons it was also considered unlikely that Australia would ever ratify the Convention. However, in the end, with its international reputation in mind, Australia was represented amongst the twenty-six nations in attendance at the conference. The Australian position was outlined in advance by Heyes, who provided the Department of External Affairs with the following advice: “Any article which might run counter to the established immigration policy of Australia, or which might prove embarrassing in the administration of that policy, would not be acceptable”.<sup>92</sup> As the *travaux préparatoires* (preparatory works) of the 1951 Conference reveal, the Australian negotiators tried their best, concerning themselves principally with those aspects that might interfere with the DP scheme and the associated work contracts as well as with the White Australia Policy. They were thus opposed to the universal application of the terms of the Convention<sup>93</sup> and argued for the right to discriminate between refugees and “other aliens” and the right “to impose reasonable conditions as to the type and place of employment, for a limited period, upon any immigrant who seeks admission to its territory, for the expressed purpose of taking up permanent residence therein”.<sup>94</sup> Ultimately, a compromise that allowed signatories to choose whether their obligations would be limited to European refugees or universal in their scope and an understanding that the Convention would not interfere with immigration policy assuaged most of the Australian concerns. The Australian delegates happily reported that “[t]he only respect in which the convention has not been remoulded to our satisfaction or capable acceptance by use of reservation

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<sup>89</sup> Tasman Heyes, 1948, quoted in Brennan, *Tampering with Asylum*, p.2 [emphasis added].

<sup>90</sup> *Ibid.*, p.2.

<sup>91</sup> Horgan to Secretary of the Department of Immigration, 8 May 1950, cited in David Palmer, “The Quest for ‘Wriggle Room’: Australia and the Refugees Convention, 1951-73”, *Australian Journal of International Affairs*, Vol. 63, 2 (2009), p.292.

<sup>92</sup> Tasman Heyes to Secretary of the Department of External Affairs, 22 May 1950, NAA, A1838 855/11/11 PART 2.

<sup>93</sup> The terms of the Convention were limited to “events occurring before 1 January 1951”, i.e. the war in Europe, but were not explicitly limited to Europeans. See UNHCR, *Convention Relating to the Status of Refugees* (Geneva, 1951). In the end, however, a compromise was reached that allowed signatories to choose whether to limit their obligation to European refugees or not.

<sup>94</sup> Paul Weis, ed., *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (Cambridge, 1995).

is that it does in some respects give refugees more favourable treatment than that given to other aliens”.<sup>95</sup>

Australia acceded to the Convention on 22 April 1954 and, as the requisite sixth signatory, was responsible for bringing it into force. Australia’s Permanent Representative to the UN, William Douglass Forsyth, suggested that this act, in addition to the large number of European refugees welcomed via the DP scheme and Australia’s financial contributions to the IRO, constituted “further evidence of our compassionate concern with this problem by formally stating our binding adherence to a Convention which will elevate the standard of treatment of refugees to the status of international legal obligation”.<sup>96</sup> But it was not difficult to support in theory a treaty that in practise would have little domestic impact. Australia only signed the Convention in 1954 (recording six reservations) because it was able to opt out of the universality clause and thus protect its restrictive immigration policy.<sup>97</sup> As Australia was unlikely to receive spontaneously presenting European refugees displaced by “events occurring before 1 January 1951” and since it had no obligations to other refugees, particularly those in its immediate region, it was able to maintain complete control over its refugee intake and continue its preferential resettlement of desirable European refugees. Although it agreed to allow European refugees to apply to come to Australia via the assisted passage schemes it had established with some European countries (in addition to Britain) for migrants, as Palmer observes, this was little more than a means of preserving international goodwill and expanding its migrant selection pool.<sup>98</sup> No humanitarian concessions were to be made for the refugees and, in any case, the Australian selection officers were instructed to accept only “token numbers”.<sup>99</sup> Just as it had in the past, Australia was content to view the refugee problem as a specifically European one.

The Menzies government continued to defend Australia’s right to select and exclude during the drafting of the International Covenant on Civil and Political Rights (ICCPR) in 1955. In a brief prepared for the General Assembly, protesting the inclusion of a right of asylum, the Australian government expressed its opinion that “any limitation of the right to exclude undesirable immigrants or visitors [was] unacceptable”.<sup>100</sup> It was also cautious with respects to early drafts of the 1967 Declaration on Territorial Asylum produced in the late 1950s, which sought to make the principle of *non-refoulement* universally applicable, responding with the usual concerns regarding potential conflict with Australia’s immigration policy, as well as the ways in which it might impinge upon national security and national sovereignty.<sup>101</sup> As Klaus Neumann notes, “[r]ather than rejecting a declaration outright, as they had done initially, Australian negotiators played an important role in watering down its provisions”,<sup>102</sup>

<sup>95</sup> Cable from the Australian delegation in Geneva, 20 July 1951, NAA, A1838 855/11/11, Part 3.

<sup>96</sup> Forsyth, 22 January 1954, quoted in Palmer, “The Quest for ‘Wriggle Room’”, p.291.

<sup>97</sup> Neumann, *Refuge Australia*, p.85.

<sup>98</sup> Palmer, “The Quest for ‘Wriggle Room’”, p.298.

<sup>99</sup> Tasman Heyes to Acting Minister for Immigration, 18 August 1954, cited in Palmer, “The Quest for ‘Wriggle Room’”, p.298.

<sup>100</sup> From a brief prepared for the General Assembly of the United Nations during the drafting of the International Covenant on Civil and Political Rights. See Brennan, *Tampering with Asylum*, p.2.

<sup>101</sup> David Palmer, “The Values Shaping Australian Asylum Policy: A Historical and Ethical Inquiry” (PhD diss., University of New South Wales, 2007), p.68.

<sup>102</sup> Klaus Neumann, “Whatever Happened to the Right of Asylum?”, *Inside Story*, 16 December 2010 <<http://inside.org.au/whatever-happened-to-the-right-of-asylum/>>.

using its “proud record in the matter of resettlement of and assistance to refugees since the end of World War II [...] to stifle any criticism in the General Assembly, of our present reluctance to accept the draft declaration on the Right of Asylum”.<sup>103</sup> Similarly, it delayed signing the 1960 Convention on the Status of Stateless Persons because it was not limited by temporal and geographic limitations like the Refugee Convention.<sup>104</sup>

The ongoing resistance to the principle of asylum (i.e. the non-discriminatory provision of protection to refugees) during the second Menzies government might seem somewhat paradoxical, given the liberalisation of the White Australia Policy that was occurring at the same time in response to foreign policy pressures, the burgeoning anti-racist discourse and influential bureaucratic figures such as Peter Heydon, head of the Department of Immigration in the 1960s.<sup>105</sup> But Australia’s reluctance to commit itself to formal obligations to refugees was less about race than it was about control. After all, with the DP program, Australians had demonstrated they could cope with, and adapt to, large numbers of refugees and migrants from increasingly diverse backgrounds — provided they were invited, carefully selected, tightly controlled and clearly serving the national interest. The European refugees had been welcomed into Australian society because they were chosen. While stretching the bounds of White Australia somewhat, they still fitted within and, indeed, helped to reinforce the immigration policy based, as it was, on the principles of selection, restriction and control. The kinds of refugees to whom Australia would be bound under the aforementioned international agreements, should they include a formal right to asylum, would be the antithesis of all of these things — uninvited, unpredictable, unnecessary for the national interest and hence, unwanted. Thus, the issue was not about refugees as such but about *which* refugees Australia would extend its hospitality to and *the conditions under which they came*, as demonstrated by the disparate responses to Jewish refugees and European Displaced Persons in the immediate aftermath of the war.

### Conclusion

Critics of both the Coalition and Labor Commonwealth governments’ punitive approach to processing and resettling onshore asylum seekers in the first decade of the twenty-first century might like to view these governments’ policies and practices as a rupture from the past, which is characterised as a compassionate “golden age” of resettling refugees. Meanwhile John Howard and subsequent Labor Prime Ministers have proudly declared themselves to be heirs to a proud humanitarian tradition of accommodating people driven from their homelands. In respect to the period between Federation and 1951, both of these assertions do not withstand scrutiny. Even greater claims have been made about the magnanimous resettlement of Indochinese refugees — including Australia’s first unauthorised onshore arrivals — under Malcolm Fraser’s Liberal government in the mid-to-late 1970s. This period has been cited by many commentators and historians as a particularly salient counterpoint to the punitive stance

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<sup>103</sup> Acting Secretary of the Department of Immigration, 1960, cited in Neumann, “Whatever Happened to the Right of Asylum?”.

<sup>104</sup> Palmer, “The Quest for ‘Wriggle Room’”, p.300.

<sup>105</sup> For explanation of this liberalisation of policy, see Matthew Jordan, “The Reappraisal of the White Australia Policy Against the Background of a Changing Asia”, *Australian Journal of Politics and History*, Vol. 52, 1 (2006), pp.224-43; Sean Brawley, *The White Peril: Foreign Relations and Asian Immigration to Australasia and North America, 1919-78* (Sydney, 1995), pp.1-3, 303-5; and Gwenda Tavan, *The Long, Slow Death of White Australia* (Melbourne, 2005).

adopted by more recent governments that have sought to demonise those seeking asylum and turn back their boats. Like the claims concerning the pre-1951 period addressed in this article, this interpretation warrants contesting and is a topic which I take up elsewhere.<sup>106</sup>

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<sup>106</sup> Katrina Stats, “Welcome to Australia? A Reappraisal of the Fraser Government’s Approach to Refugees, 1975-83”, *Australian Journal of International Affairs* (under review).

## 2.2: Reluctant Refuge: Australia's Responses to Refugees and Asylum Seekers in the Postwar Period, 1956-76

I remember celebrating Stalin's birthday at school. Our teacher asked the class, "Who likes Stalin?" One of my classmates said that she and her parents didn't. That night her family was taken by force and deported to Siberia. I never saw her again.<sup>1</sup>

Having acceded to the United Nations Refugee Convention and, in doing so, bringing it in to force in 1954, Australia's commitment to its principles was gradually tested with calls upon its hospitality coming from refugees both abroad and in its own region, border crossing asylum seekers and political defectors in the postwar period. Following on directly from the previous paper, this chapter examines Australia's responses to various refugee crises in the two decades between 1956-76 that coincided with the gradual liberalization of Australia's immigration policies and rapid diversification of the population. While Australia responded admirably to some refugee crises during this period – the Hungarians in the 1950s, for example, and the Chileans in the 1970s – its disparate reaction to others (the West Papuans in the 1960s, the Asians Ugandans and Vietnamese in the 1970s) demonstrated that, even as it progressively abandoned its discriminatory immigration policies, when it came to refugees, the nation was no less selective or self-serving than it had been in the past.

### The Hungarian uprising

On 23 October 1956, thousands of enraged protestors in Budapest tore down the towering bronze statue of Joseph Stalin that had been presented to the Hungarian people on the occasion of the now-deceased Communist leader's 70<sup>th</sup> birthday, as revolution swept the country. Imre Molnar, who recalled the disappearance of his outspoken classmate (above), was just 15 years old at the time of the uprising, during which at least 2,500 civilians were

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<sup>1</sup> Imre Molnar, interviewed by Bridget Guthrie as part of *Belongings: Post-WWII Migration Memories and Journeys*, a collaborative project between the Migration Heritage Centre and Albury City, <http://www.migrationheritage.nsw.gov.au/exhibition/belongings/molnar/>; accessed 1 September 2016.

killed before it was quickly and brutally suppressed by Soviet forces. He participated briefly in the fighting. “Afterwards I couldn’t believe what I’d done, how stupid! But I was very young and felt I could live forever. I only participated in the fighting for one day and that was enough.”<sup>2</sup> He was one of 200,000 who subsequently fled the Communist regime before the borders were sealed. Like most of the refugees, Molner and his family made their way to Austria.

We were advised to leave all documentation behind, no large sums of money, no belongings; we had to make things look like it was all innocent. Late that evening, we took off on foot. It was very cold, it had snowed and we had to walk five to seven kilometres to reach the border. We walked along the railway line and as we approached the checkpoint at the border, where the trains stopped, the organiser told us to lie down in the snow and mud. Next minute we heard dogs barking, the Russian soldiers manning the checkpoint came outside and machine gun fired for about five to ten minutes to scare off any potential escapers. This continued every half an hour or so. They also used large spotlights up and down the checkpoint area [and] finally sometime after midnight they stopped. We crawled past the remains of the border fence that had been broken in the Revolution; on our hands and knees we made it into Austria.<sup>3</sup>

Shortly after the uprising began (and while it still seemed possible it might succeed in its aims), the Austrian Government had promised sanctuary for all Hungarians seeking refuge. But when 10,000 people crossed the border into Austria in the first weekend after Soviet tanks re-entered Budapest to crush the uprising, and with thousands more to follow, Austrian Interior Minister, Oskar Helmer, called upon UNHCR and the Intergovernmental Committee for European Migration for urgent assistance in accommodating and resettling the refugees.<sup>4</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Rupert Colville, ‘Fiftieth Anniversary of the Hungarian Uprising and Refugee Crisis’, UNHCR, 23 October 2006, <http://www.unhcr.org/news/latest/2006/10/453c7adb2/fiftieth-anniversary-hungarian-uprising-refugee-crisis.html>; accessed 2 September 2016. UNHCR had been established in 1949 (taking over from the IRO) as a temporary organization to deal with a limited and finite refugee population produced by events prior to 1951, namely the two world wars. It was not clear, then, if its mandate could or should cover the Hungarian refugees. The UN General Assembly considered the issue of the Hungarian refugees at an emergency special session in November 1956 and at its eleventh ordinary session, passing three resolutions: no. 1006 ES II (9 November 1956), no. 1129 (XI) (21 November 1956) and no. 1039 (XI), under the terms of which the

At the height of the Cold War and with the European winter approaching, the Hungarian uprising attracted the attention of the world's media – it was the first major crisis to be televised – and the sympathy of its Western audiences. Determined not to repeat the mistakes of the recent past, the governments of Western nations responded quickly and sympathetically; astonishingly, 100,000 refugees were resettled within the first ten weeks of the crisis.<sup>5</sup> In Australia, the conservative Menzies Coalition Government initially offered to take 3,000 refugees and implied that concessions might be made with respects to the normal migrant selection criteria in order to accommodate a number of “compassionate cases, such as children and people of ages exceeding the normal limits imposed for other assisted migrants”.<sup>6</sup> (It subsequently lifted restrictions on elderly migrants.<sup>7</sup>) Immigration Minister Athol Townley suggested that “[s]uch a gesture [was] in keeping with Australia's proud record in having provided a haven for more than 200,000 displaced persons who were made homeless by the last war.”<sup>8</sup> As the numbers fleeing Hungary swelled, the Government quickly increased its offer to 5,000, and later 10,000, places.<sup>9</sup> Ultimately, Australia accepted 14,000 Hungarian refugees by 1959 including Imre Molner, his sister and her husband who arrived in Australia on 6 April 1957. Molner stayed three months at the Bonegilla Migrant

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UNHCR assumed primary responsibility for coordinating the relief effort and resettlement or repatriation of the Hungarian refugees. See Sixth Report of the Activities of the Office of the United Nations High Commissioner for Refugees, COE Doc. 708, 1 October 1957.

<sup>5</sup> Colville, ‘Fiftieth Anniversary of the Hungarian Uprising and Refugee Crisis’. Approximately 180,000 refugees escaped to Austria while 20,000 fled to Yugoslavia. At the end of January 1958, all of those who entered Yugoslavia had been resettled or voluntarily repatriated. By the end of August 1958, 166,000 Hungarian refugees had been resettled, 17,000 repatriated and just 17,000 remained in Austria. It is also worth noting that many of the resettlement countries accepted refugees with conditions that would have disqualified them as migrants under normal circumstances. See Council of Europe, Seventh Report on the activities of the United Nations High Commissioner for Refugees transmitted to the Council of Europe, doc. 857, 6 October 1958, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=1176&lang=en>; accessed 8 September 2016.

<sup>6</sup> Athol Townley, Minister for Immigration, *Commonwealth Parliamentary Debates* [henceforth *CPD*], House of Representatives (henceforth HoR), 8 November 1956, p. 2142; ‘We'll Take Up to 3000 Hungarians’, *The Age*, 9 November 1956, p. 5.

<sup>7</sup> See Colville, ‘Fiftieth Anniversary’, p. 10.

<sup>8</sup> Athol Townley, Minister for Immigration, *CPD*, HoR, 8 November 1956, p. 2142.

<sup>9</sup> In early December, it was announced that Australia would take 5,000 refugees (‘Hungarian Migration Commended’, *The Age*, 11 December 1956, p. 3). On 22 January 1957, the admission of a further 5,000 was announced. See Sir William Joseph Slim, Governor-General's speech, *CPD*, HoR, 19 March 1957, p. 6; ‘Australia to Admit 5,000 More Hungarian Refugees’, *Toledo Blade*, 27 August 1957, p. 24.



Hostel before settling into life in Melbourne, where he was relieved to find that “everybody was free here, you were treated with respect and the neighbours did not look at you and watch what you were doing”.<sup>10</sup>

Australia was praised for its “immediate and practical”<sup>11</sup> response to the crisis and its ‘honourable’ contribution to the resettlement effort.<sup>12</sup> As the Chairman of the Immigration Planning Council noted, “No other country, with the possible exception of the United States, had responded as quickly, positively and practically as Australia in offering sanctuary to Hungarian refugees.”<sup>13</sup> This seemingly “swift and generous”<sup>14</sup> response was most certainly, as Townley pointed out, in keeping with the post-war displaced persons scheme, though less on account of its humanitarian motives and more for its political expedience, and, as such, it did not represent a change from the historical reticence to provide refuge as detailed in the previous chapter. Although it was undoubtedly an *ad hoc* response to a quickly arising, spontaneous refugee situation, it was nevertheless a carefully calculated and self-serving one. First of all, the Hungarian refugees fleeing a Communist regime held significant political value in the context of the Cold War and, like the controversial defection of Russians Vladimir and Evdokia Petrov prior to the 1954 election, promised potential electoral advantage for the Menzies Liberal Government, much to the chagrin of the Labor Opposition.<sup>15</sup> Second, the Hungarian refugees provided an easy opportunity to fulfil the outstanding annual immigration quota with desirable migrants on the cheap, since it was expected that the Intergovernmental Committee for European Migration would help to cover the transport costs of the refugees.<sup>16</sup> Additionally, Australia’s ready acceptance of the

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<sup>10</sup> Molnar, interviewed by Bridget Guthrie, *Belongings: Post-WWII Migration Memories and Journeys*, <http://www.migrationheritage.nsw.gov.au/exhibition/belongings/molnar/>; accessed 1 September 2016.

<sup>11</sup> A.S. Hulme, MP, Chairman of the Immigration Planning Council, quoted in ‘Hungarian Migration Commended’, *The Age*, 11 December 1956, p. 3.

<sup>12</sup> ‘Refugees from Hungary’, *The Age*, 4 December 1956, p. 2.

<sup>13</sup> Hulme quoted in ‘Hungarian Migration Commended’.

<sup>14</sup> Klaus Neumann, *Refuge Australia: Australia’s Humanitarian Record*, UNSW Press, Sydney, 2004, p. 35.

<sup>15</sup> The Labor Party’s annoyance at the prospect of an influx of anti-Communist refugees was evident in its response to the Government’s initial announcement in Parliament. See Les Haylen, *CPD*, HoR, 8 November 1956, pp. 2147-9.

<sup>16</sup> Gordon Jockel, Australian diplomat to UNHCR, arguing the case for adopting a more generous response to Arthur Tange, 5 December 1956, National Archives of Australia (henceforth NAA), A10034 252/9/8-2, cited in Neumann, *Refuge Australia*, pp. 35-6.

Hungarian refugees provided a useful boost to its international reputation, helping to ameliorate criticism of its restrictive immigration policies.<sup>17</sup>

### **“Unexciting incidents” – political defections during the 1956 Olympics**

The Hungarian uprising occurred just before the 1956 Melbourne Olympic Games. The likelihood of defectors from Communist regimes during the Games necessitated the formulation of a set of principles and processes to deal with an anticipated rush of requests for asylum from Olympic athletes, officials and visitors to Australia from Eastern Europe and Asia. This was regarded as the responsibility primarily of External Affairs rather than Immigration, at least in the first instance. Richard Casey, the Minister for External Affairs, recommended adopting a discrete and discretionary approach to all such requests from European and Asian applicants alike. Although he acknowledged that the provision of asylum should rest primarily on humanitarian grounds, Casey also emphasised the potential intelligence and propaganda value of political defectors.<sup>18</sup> Cabinet chose to adopt Casey’s recommendations including provisions for family reunion and financial support for approved asylum applicants. Asylum decisions were to be kept out of public view and, if they arose, were to be “de-dramatised”<sup>19</sup> and treated “as unexciting incidents which were bound to occur”.<sup>20</sup>

The fact that political asylum was regarded as matter for External Affairs (who devised the principles and processes by which the applications were to be handled) and the Australian Security Intelligence Organisation (ASIO, who were responsible for making the asylum decisions) helps to explain why it was to be provided irrespective of race. However, after

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<sup>17</sup> The Department of External Affairs anticipated “political advantages” to come from Australia’s decision to select Hungarian refugees in Yugoslavia. See Klaus Neumann, *Across the Seas: Australia’s Response to Refugees. A History*, Black Inc., Melbourne, 2015, p. 153.

<sup>18</sup> Casey noted: “Although the grant of asylum rests primarily on humanitarian grounds, political factors sometimes provide an ancillary argument in favour of it.” R.G. Casey, Cabinet Submission no. 398, ‘Political Asylum in Australia’, Canberra, 4 October 1956, NAA, A1838 1606/4.

<sup>19</sup> J.C.G. Kevin, External Affairs, record of telephone conversation with Mr Francis Stuart, ‘Political Asylum and Refuge’, 5 December 1956, NAA, A1838 1606/4.

<sup>20</sup> Cabinet decision no. 487, 16 October 1956, NAA, A4926 398, cited in David Palmer, ‘The Values Shaping Australian Asylum Policy: A Historical and Ethical Inquiry’, PhD Diss., University of New South Wales, 2007, p. 118.

asylum was granted, it fell to Immigration to assess the refugees' suitability as permanent settlers, that is, the conditions under which asylum would be provided. While European and Asian defectors were to be treated indiscriminately as asylum seekers, their prospects for settlement remained subject to the standard immigration criteria. Casey suggested that any Asian refugees and defectors be treated in the same manner as the so-called "distinguished Asians"; that is, provided with renewable temporary certificates of exemption.<sup>21</sup> Europeans, on the other hand, were to be offered permanent residence after a period of exemption and subject to the standard health, security and identity checks.

Thus, this was not a departure from past policy, except, perhaps, for the fact that it was a pre-emptive rather than reactive approach to asylum. The Government's flexible approach merely emphasised state discretion and reaffirmed the primacy of territorial sovereignty premised, as it was, on the understanding that "[e]very State has complete jurisdiction over its own territory and the individuals within it."<sup>22</sup> As Casey pointed out, "[i]t follows from this principle that every State has absolute discretion concerning the admission of aliens to its territory and thus may not only exclude or expel aliens but admit them, with or without conditions, at will. Competence to grant asylum to defectors or refugees therefore derives directly from the territorial sovereignty of States."<sup>23</sup> Casey's submission to Cabinet on this matter also reiterated Australia's firm position that "no individual has a right to asylum, and [that] the preparedness of a State to grant it in a particular case depends on its relevant domestic laws".<sup>24</sup> In the end, Australia received only 19 applications for asylum, all from Hungarians, at the conclusion of the Olympics and all, except for one who returned to Hungary, were eventually granted permanent residence.<sup>25</sup> Writing in retrospect, Immigration Department Head Peter Heydon argued that the decisions about the provision of asylum at

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<sup>21</sup> Casey, Cabinet Submission no. 398, p. 8.

<sup>22</sup> *Ibid.*, p. 4.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> Tasman Heyes, Secretary of the Department of Immigration, to Secretary of the Department of External Affairs, 'Political Asylum in Australia', 11 April 1958, NAA, A1838 1606/4. See also Statement of the Committee of Review, 21 December 1956, NAA, A1838 1606/4, which recommended all the applicants be regarded as political refugees and be permitted to remain in Australia under exemption for 12 months and, pending the relevant health, character and security checks, be permitted to stay permanently thereafter.

this time were characterised by “a clear concern by the Government to avoid accepting the concept of political asylum”.<sup>26</sup>

### **Menzies and the West Papuan refugees**

Of course, in signing the UN Refugee Convention in 1954, Australia had subscribed to a limited concept of asylum. But the Convention acknowledged only an individual’s right to leave their country of origin in order to *seek* asylum; it did not contain a reciprocal obligation on the part of potential host states to *admit* asylum seekers, but merely not to *refoule* (return to danger) those who found entry (Article 33) or to punish them on account of their means of entry (Article 31). The Convention simply recommends “that Governments continue to receive refugees in their territories and that they act in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement”.<sup>27</sup> As noted, when Australia acceded to the Convention, it regarded the refugee situation as a European problem requiring a European solution.<sup>28</sup> Since the terms of the Convention applied to only those persons who had become refugees as a result of events occurring before 1 January 1951 (i.e. the Second World War, although an exception was made for those fleeing Hungary after the uprising<sup>29</sup>) and, in Australia’s case, only European refugees, Australia was effectively protected by distance and its formidable ocean moat against any invocations of its obligations towards the refugees. It was able to contribute “its fair share” via selective resettlement that served its population and labour needs.

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<sup>26</sup> Peter Heydon to Minister for Immigration, 23 April 1970, pp. 3-4, NAA, A6980 S250089, cited in Palmer, ‘Values Shaping’, 2007, p. 119.

<sup>27</sup> UNHCR, *Convention Relating to the Status of Refugees*, Geneva, 1951.

<sup>28</sup> This was reflected in the brief for the Australian delegates, which stated “The traditional refugee problem does not touch Australia closely. Traditional rights of asylum have been developed in Europe among countries with contiguous frontiers. There have been isolated cases of asylum for Asians during the war, but it would be contrary to immigration policy to have a binding obligation written into the convention to accept the principle.” Brief for the Australian delegation, Conference of Plenipotentiaries, July 1951, pp. 1-2, NAA, A1838 855/11/11 Part 3, cited in Palmer, ‘Values Shaping’, 2007, p. 49.

<sup>29</sup> Although the Refugee Convention at this time only applied to those who were rendered refugees as a result of events prior to 1951, Paul Weis, Legal Advisor to the UN High Commissioner for Refugees, successfully argued that the Hungarian exodus was directly related to the establishment of the People’s Republic of Hungary in 1947-48 (i.e. an event prior to 1951) and that the uprising and subsequent refugee crisis were “after effect[s] of this earlier political change”. Paul Weis to M Pagès, ‘Eligibility of Refugees from Hungary’, interoffice memorandum, 9 January 1957, UNHCR Archives, HCR/22/1/HUNG.

Australia did not face a regional refugee problem until the relinquishment of West Papua to Indonesia by the Dutch in 1963. This resulted in a significant number of West Papuans presenting at the border of the Australian Territory of Papua and New Guinea.<sup>30</sup> With the exception of the ‘Dutch pensioners’ (West Papuans who were supported by the Dutch Government) and an ethnic Chinese family, Australian officials returned all of the 377 West Papuan refugees who crossed the border in 1963 and the first half of 1964. This experience reinforced the concerns Australia had about committing to a universal right of asylum. It no doubt contributed to the Government’s hesitance regarding the 1967 Protocol amending the 1951 UN Refugee Convention, which removed the geographical and temporal specificity of the Conventions terms. When Australia did sign the Protocol six years later, it was on the proviso that it would not apply to Papua New Guinea.<sup>31</sup>

### **Holt’s liberalization of White Australia**

As Immigration Minister for eight years (1949-57) under Menzies, Holt had overseen a series of immigration reforms that gradually (and sometimes surreptitiously) relaxed, though did not substantially alter, the White Australia Policy. When he took over as Prime Minister after Menzies’ retirement in 1966, he approved, with some hesitation, the reform program of Immigration Minister Hubert Opperman.<sup>32</sup> These reforms included reducing the 15-year residence requirement for citizenship for non-European spouses, children and parents of citizens to five years, the same as their European counterparts, and allowing well-qualified and highly skilled non-Europeans to migrate to Australia.<sup>33</sup> While these changes represented

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<sup>30</sup> One group of West Papuan refugees did make it to the Torres Strait islands on 1969 but were transferred back to PNG to lodge applications for temporary residence and eventually returned to Indonesia. See Klaus Neumann, ‘Oblivious to the Obvious? Australian Asylum-Seeker Policies and the Use of the Past’, in Neumann and Gwenda Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand*, ANU E-Press, Canberra, 2009, p. 52

<sup>31</sup> Neumann, *Refuge Australia*, pp. 85-6.

<sup>32</sup> See Matthew Jordan, ‘The Reappraisal of the White Australia Policy Against the Background of a Changing Asia’, *Australian Journal of Politics and History*, vol. 52, no. 1, 2006, pp. 224-43, for details on Opperman’s role (and that of department head, Peter Heydon) and Holt’s hesitance.

<sup>33</sup> See Hubert Opperman, ‘Ministerial Statement: Immigration’, *CPD*, HoR, 9 March 1972, pp. 68-70. Initially, the migration of these “distinguished and highly qualified” Asians and Pacific nationals remained on a temporary basis though, in line with the new rules, they became eligible for residency and naturalisation after five years. After Opperman reported that the first 118 of these distinguished entrants had proven their “general quality” as migrants, this was changed in 1967 to provide resident status on entry. See Jordan, ‘The Reappraisal of the White Australia Policy’, pp. 241-2.

a significant liberalisation of the White Australia Policy, the policy remained explicitly selective, devised to skim only the cream of Asian immigrants while at the same time maintaining a “predominantly homogenous population”.<sup>34</sup> As Opperman himself explained, “[t]he changes were not intended to depart from the basic principles of our policy which they qualify and modify in a special way rather than revoke.”<sup>35</sup>

These changes were of little help to the 80,000 South Asians who were expelled from Uganda by Idi Amin in 1972. Since a large proportion of these South Asians held British passports, primary responsibility for dealing with the crisis fell to Britain. When the British Government appealed to Australia for help resettling the expellees, Australia’s High Commissioner in London (and Holt’s successor as Immigration Minister under Menzies between 1958-63) Sir Alec Downer encouraged the McMahon conservative coalition Government “on the grounds of humanity” to admit 2,000 of the Ugandan Indians,<sup>36</sup> emphasising the potential benefits in terms of Australia’s international reputation. In a letter to the Prime Minister, Downer pointed out, “[a] concrete offer to accept some of these people would win us plaudits far and wide.”<sup>37</sup> Facing an election, however, Prime Minister William “Billy” McMahon indicated his government would not compromise its immigration policy and that Ugandan Asians would only be admitted as permitted by the existing immigration criteria. The Government regarded the refugees as a British problem for which it would provide “sympathetic consideration” to ways it could assist, including fast tracking immigration applications from South Asian Ugandan applicants and the provision of financial assistance, but no stretching of the immigration policy on humanitarian grounds.<sup>38</sup> When asked by a journalist if compassion might be sufficient grounds for migration, McMahon replied, “our own interests must come first and consequently we should be able to choose those migrants that are going to make the greatest contribution to the development

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<sup>34</sup> Hubert Opperman, speech at the Youth and Student Seminar on International Affairs, Canberra, 28 May 1966, available at [http://www.multiculturalaustralia.edu.au/doc/opperman\\_1.pdf](http://www.multiculturalaustralia.edu.au/doc/opperman_1.pdf).

<sup>35</sup> *Ibid.*

<sup>36</sup> Neumann, *Refuge Australia*, pp. 47-8.

<sup>37</sup> Quoted in Klaus Neumann, ‘Hard of Heart: A Bipartisan Approach’, *Australian Financial Review*, 28 May 2004, p. 6.

<sup>38</sup> Jim Forbes, ‘Immigration: Asians from Uganda’, *CPD*, HoR, 22 August 1972, p. 468.

of this country”.<sup>39</sup> Thus, as Immigration Minister Jim Forbes explained to Parliament, as per the revised immigration policy Australia would only take professionally qualified immigrants who could “be readily absorbed” and “integrate successfully into the Australian community”.<sup>40</sup> This amounted to just 190 approved applications covering 491 people.<sup>41</sup> An appeal from the UN High Commissioner for Refugees resulted in nothing more than an offer of increased financial assistance.<sup>42</sup>

### **It’s time: Whitlam’s internationalism and cosmopolitanism**

The McMahon Government’s “firm and unshakeable determination ... to maintain a homogenous society in Australia”<sup>43</sup> did not, however, save it from electoral defeat in December 1972. To the contrary, it proved to be an anachronistic anathema to voters who agreed with Whitlam and the ALP that, after 23 years of conservative rule, it was time for change. Whitlam promised unprecedented change in the shape and conduct of Australia’s domestic and foreign policy. Declaring isolationism “a selfish concept”,<sup>44</sup> Whitlam (whose father had been a member of the UN committee responsible for producing the Universal Declaration of Human Rights) was keen to communicate “to the world [Australia’s] commitment to international law and our eagerness to contribute to cooperative endeavours”.<sup>45</sup> He did so within weeks of his election victory by signing both the International Covenant on Economic, Social and Cultural Rights and the International

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<sup>39</sup> Quoted in Neumann, ‘Hard of Heart’, p. 6.

<sup>40</sup> Jim Forbes, *CDP*, HoR, 17 August 1972, p. 333; Jim Forbes, ‘Immigration: Asians from Uganda’, *CPD*, HoR, 22 August 1972, p. 468.

<sup>41</sup> Neumann, ‘Hard of Heart’; Klaus Neumann, ‘Our Own Interests Must Come First: Australia’s Response to the Expulsion of Asians from Uganda’, *History Australia*, vol. 3, no. 1, 2006, pp. 10.1-10.17. In fact, by 8 November 1972 (the deadline for expulsion Amin had set), only 46 of the approved applicants had arrived. Of the others, some had received resettlement offers from other countries while others were no longer required to leave, after Amin recanted on his threat to expel Asian Ugandan citizens as well.

<sup>42</sup> Neumann, ‘Our Own Interests Must Come First’, p. 10.6.

<sup>43</sup> Jim Forbes, *CDP*, HoR, 17 August 1972, p. 333.

<sup>44</sup> Gough Whitlam, Deputy Leader of the Opposition, ‘Australia – Base or Bridge?’, Evatt Memorial Lecture, Sydney University Fabian Society, 1966.

<sup>45</sup> Gough Whitlam, ‘Australia and International Law’, address by the Prime Minister to the seminar on Public International Law, Canberra, 26 July 1975. Between 2 December 1972 and 5 June 1975, the Whitlam Government was responsible for 93 international agreements (46 multilateral, 47 bilateral) entering into force in Australia. See Gough Whitlam, *CPD*, HoR, 2 September 1975, pp. 887-90.

Covenant on Civil and Political Rights on 18 December 1972. He then set about signing a host of human rights conventions in preparation for the 25<sup>th</sup> anniversary of the Universal Declaration of Human Rights in December 1973.<sup>46</sup> These included the 1954 *Convention Relating to the Status of Stateless Persons*; the 1957 *Agreement Relating to Refugee Seamen and the Protocol to the Agreement Relating to Refugee Seamen*; the 1961 *Convention on the Reduction of Statelessness*; and the 1967 *Protocol Relating to the Status of Refugees*. The signing of these international agreements was highly symbolic, but they also had profound practical implications by, for example, formally committing Australia, for the first time, to obligations to non-European refugees and asylum seekers.

The Whitlam Government also repealed Calwell's "odious"<sup>47</sup> *War-time Refugees Removal Act* in 1973 and, in 1975, fulfilled its election promise to ratify the International Convention for the Elimination of All Forms of Racial Discrimination. Whitlam had long campaigned against the White Australia Policy before coming to office and had played a pivotal role in its removal from the ALP policy platform in 1965, regarding "it ideologically intolerable and morally indefensible that a socialist party should espouse a policy of racial discrimination".<sup>48</sup> In the lead-up to the 1972 election, he campaigned on a platform of racial equality, including a pledge to ratify the Convention, which Australia had signed in October 1966 under Holt but failed to ratify. The introduction of the Migration Bill 1973, which was designed to remove all discriminatory provisions from the Migration Act, was one of the first acts of the new Whitlam Government and, as Immigration Minister Al Grassby explained, was "a token of our determination to banish racial discrimination within our community".<sup>49</sup> This was achieved, ironically, with one of the Whitlam Government's last actions – the incorporation of the terms of the Convention into domestic law via the *Racial Discrimination Act 1975*, which categorically completed the task, cautiously begun by Menzies and then taken on in earnest by Holt, of dismantling the White Australia Policy.

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<sup>46</sup> See Department of Foreign Affairs, 'Ratification of International Labor Organisation Conventions', media release, 6 March 1973, available via Whitlam Institute Online Archives.

<sup>47</sup> Gough Whitlam, letter to the *Sydney Morning Herald*, 2 January 2003.

<sup>48</sup> Gough Whitlam, *The Whitlam Government 1972-1975*, Viking, Melbourne, 1985, p. 490.

<sup>49</sup> Immigration Minister Al Grassby, introducing the Migration Bill 1973, designed to remove all forms of racial discrimination, in the first session of Parliament under the Whitlam Government, *CPD*, HoR, 28 February 1973, p. 54.



But although Whitlam's Labor Government was committed to a non-racial approach to immigration, it was no less selective than its predecessors. While liberalising the immigration policy, the Whitlam Government was also responsible for radically reducing the level of immigration<sup>50</sup> and, while discrimination on the basis of race, colour or nationality was formally ended, the reduced migrant intake meant that skilled migrants and family reunion applicants were prioritised, such that the impact of the new non-discriminatory approach was fairly minimal. The Government insisted that "the sympathy, understanding and tolerance with which [its policies were] administered apply no less strongly to refugees than to migrants generally"<sup>51</sup> – nor less selectively. In Opposition Labor had been critical of the McMahon Government's approach to the Ugandan exiles, arguing that "Australia should not stand by with eyes closed to suffering which is being so heartlessly thrust on these people".<sup>52</sup> However, in office, Labor did little more to assist them, Whitlam merely reiterating McMahon's line, "If they have got qualifications such as entitle people to come to Australia then certainly they can come."<sup>53</sup> The Labor Government provided an additional \$75,000 funding to UNHCR but approved just 50 more applications from families left stateless in transit camps after Amin's deadline for expulsion had expired.<sup>54</sup>

Race might not have mattered to Whitlam but ideology certainly did. The Whitlam Government made an open-ended commitment to refugees fleeing Chile after a military coup deposed the socialist Allende Government in September 1973,<sup>55</sup> but it was less

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<sup>50</sup> Under Whitlam, immigration fell from a record (to this day) of 185,099 in 1969-70 under the Gorton Government to just 52,752 annual admissions by 1975-76, still the lowest figure since the Immigration program was established. See Janet Phillips, Michael Klapdor and Joanne Simon-Davies, 'Migration to Australia Since Federation: A Guide to the Statistics, background note, Parliament of Australia, Parliamentary Library, updated 29 October 2010, <http://www.aph.gov.au/binaries/library/pubs/bn/sp/migrationpopulation.pdf>; accessed 23 July 2012.

<sup>51</sup> Senator Tony Mulvihill, Vice-Chairman of the Federal Labor Party's Immigration Committee, 'Refugees in the World Today', speech delivered on 28 August 1975, cited in *CPD*, HoR, 2 September 1975, p. 828.

<sup>52</sup> On 22 August, the ALP's foreign affairs spokesperson, Don Willesee, argued that there was "a clear case for accepting a limited number of these refugees on humanitarian grounds" and that "Australia should not stand by with eyes closed to suffering which is being so heartlessly thrust on these people". Quoted in Neumann, 'Our Own Interests Must Come First', p. 10.7.

<sup>53</sup> Whitlam quoted in Neumann, *Refuge Australia*, p. 49.

<sup>54</sup> Neumann, *Refuge Australia*, pp. 48-9.

<sup>55</sup> Leader of the Opposition, Malcolm Fraser, *CPD*, HoR, 8 April 1975, p. 1262.

sympathetic to the Vietnamese fleeing the Communists after the fall of Saigon at the end of April 1975. In response to Foreign Minister Don Willesee's pleas to evacuate Vietnamese employees of the Australian embassy in April 1975, Whitlam reportedly declared, "I'm not having hundreds of fucking Vietnamese Balts coming into this country with their political and religious hatreds against us."<sup>56</sup> He was famously sceptical of the refugee claims of the Vietnamese, disputing predictions of a "bloodbath" after the withdrawal of American forces.<sup>57</sup> Suggesting those fleeing South Vietnam were predominantly economic migrants seeking "an easy life", he vigorously resisted their admission to Australia.<sup>58</sup> According to York, this was not merely ideological. By the 1970s Australia no longer had the same labour and population requirements as it did in the immediate postwar period and, as noted, was more interested in attracting skilled labour and supporting family reunion.<sup>59</sup> Whitlam, who supported a united Vietnam, also cited diplomatic concerns, namely that the evacuation of refugees might be seen as partisan support of the South and a tacit rebuke of the North, whom the Government was keen to avoid antagonising.<sup>60</sup>

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<sup>56</sup> Clyde Cameron, *China, Communism and Coca-Cola*, Hill of Content Publishing, Melbourne, 1980, pp. 228-9. John Menadue, former Secretary of the Department of Prime Minister and Cabinet, explains the "Vietnamese Balts" reference: "Whitlam was influenced by experience with refugees from the Baltic States. They had come to Australia and represented a hard core of bitter opposition to the Labor Party. He anticipated that another group of refugees from communism would do the same." John Menadue, *Things You Learn Along the Way*, David Lovell Publishing, Melbourne, 1999, pp. 135-6.

<sup>57</sup> The Government was repeatedly warned of an impending "bloodbath". A daily report of the situation in Vietnam received by the Department of Foreign Affairs on 28 March 1975 reported "One senior VNAF officer stated this week that at least 500,000 service officers and government officials can expect to be executed if the North Vietnamese achieve a completely [*sic*] military victory." See Department of Foreign Affairs, inward cablegram (secret), Daily Report No. 7, 28 March 1975, NAA, A1209 1974/7556. Such claims were also frequently reported in the local media. See, for example, *Sydney Morning Herald*, 12 April 1975. Immigration Minister Clyde Cameron, however, shared Whitlam's scepticism, rejecting "the 'bloodbath' propaganda from Saigon and the US which was being peddled by the Liberal and Country Parties". Cameron, *China, Communism and Coca-Cola*, pp. 228-9. Speaking in 1978, after having handed the leadership reins to Bill Hayden, Whitlam argued: "They said three years and more ago there would be a bloodbath in Vietnam when the country was reunited and the Americans were expelled. There hasn't been a bloodbath in Vietnam and there is not likely to be." Gough Whitlam, 'Vietnam', Australian National University seminar, 22 September 1978, available from the Whitlam Institute e-collection: <https://www.whitlam.org>.

<sup>58</sup> Whitlam, 'Vietnam'.

<sup>59</sup> Barry York, *Australia and Refugees, 1901-2002: An Annotated Chronology Based on Official Sources*, Parliamentary Library, Canberra, 2003, p. 3, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/online/Refugeescontents](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/Refugeescontents); accessed 26 September 2011.

<sup>60</sup> The so-called 'cables affair', regardless of the substance of the Opposition's claims and the veracity of the Government's denials of partisanship, certainly demonstrated the Government's desire not to alienate Hanoi.

Whether for economic, political or ideological purposes, the absence of a separate refugee policy meant that, despite the removal of racial discrimination, the stringent application of Australia's immigration policy could be – and was – used to exclude Vietnamese refugees, whose entry, like the Ugandans and the Jews before them, remained subject to the usual criteria of family reunion or professional eligibility. Immigration Minister Clyde Cameron, who shared Whitlam's views, made only one concession, adding the category of 'unprocessed' orphans to the list of eligible applicants for immigration.<sup>61</sup> However, concerned that it might set a precedent for the evacuation of adult refugees, Whitlam vetoed his deputy, Lance Barnard's plans to evacuate orphaned children from Saigon as well as the planned evacuation of orphans from Cambodia.<sup>62</sup> He later relented under domestic pressure from the public, media and the Opposition, who supported a more humane approach to the South Vietnamese refugees, and to avoid embarrassment after the US announced its own 'Babylift' operation.<sup>63</sup> Amidst great media fanfare, 283 Vietnamese children were brought to Australia aboard two flights in early April, an act that helped to briefly assuage criticism of Australia's otherwise limited contribution to the unfolding humanitarian crisis.<sup>64</sup>

Despite advance warning of the imminent fall of Saigon,<sup>65</sup> Whitlam, who had assumed control of Vietnamese immigration,<sup>66</sup> did not announce the categories of Vietnamese people eligible for temporary residence in Australia until 22 April, just two days before the closure of the Australian embassy in Saigon, despite having discussed the issue in a Cabinet meeting two weeks earlier.<sup>67</sup> Those eligible included spouses and children of Vietnamese students in Australia, spouses and children of Australian citizens, and Vietnamese nationals whose lives

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<sup>61</sup> Cameron, *China, Communism and Coca-Cola*, pp. 228-9.

<sup>62</sup> *Ibid.*, p. 229.

<sup>63</sup> See Joshua Forkert, 'Refugees, Orphans and a Basket of Cats: The Politics of Operation Babylift', *Journal of Australian Studies*, vol. 36, no. 4, 2012, pp. 427-44; See also Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem*, Parliamentary Paper, no. 329, Parliament of the Commonwealth of Australia, Canberra, 1976, p. 5.

<sup>64</sup> Numbers vary between sources. These are the figures cited by Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia*, Melbourne University Press, Melbourne, 1984, pp. 58-9.

<sup>65</sup> See Department of Foreign Affairs, Daily Report no. 10, Saigon, 31 March 1975, NAA, A1290 1974/7556, and cable from Geoffrey Price, Australian Ambassador in Saigon, 'South Vietnam: Dwindling Future Prospects', 31 March 1975, NAA, A1290 1974/7556.

<sup>66</sup> See Cameron, *China, Communism and Coca-Cola*, p. 229.

<sup>67</sup> See Viviani, *The Long Journey*, pp. 58-60.

were now imperilled by their association with the Australian presence in Vietnam (i.e. embassy staff). Whitlam's "blameworthy dilatoriness" did not go unnoticed.<sup>68</sup> He was lambasted at the time by the media and criticised by political commentators.<sup>69</sup> The 1976 Senate Standing Committee on Foreign Affairs and Defence later concluded that there had been "deliberate delay [evacuating the Australian Embassy in South Vietnam] in order to minimise the number of refugees with which Australia would have to concern itself" and furthermore, "that the guidelines of 22 April [1975] were so narrowly drawn that very few refugees would qualify for entry to Australia".<sup>70</sup> The Committee's report suggests that this was in order to placate the anxious Australian public. Nancy Viviani, however, suspects that "Whitlam's chief motives were a straightforward concern to avoid a new influx of emotional anti-communists into Australian politics together with a care for the attitudes of Hanoi".<sup>71</sup> In either case, if this was indeed Whitlam's intention, it was successful; by the time the embassy was evacuated three days later, of 3,667 nominations, only 366 Vietnamese nationals had been approved for entry into Australia and only 342 of these had been advised of their approval. Ultimately, just 78 could be located in time for the evacuation.<sup>72</sup> Those evacuated included 34 nuns whom journalist Dennis Warner argued, in his submission to the Senate report, were unlikely refugees, and a basket of cats belonging to UN officials.<sup>73</sup>

In May, under domestic and international pressure to contribute to the refugee crisis, Whitlam agreed to admit 3,000 refugees from camps in Guam and Thailand, who were to be

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<sup>68</sup> See, for example, J.D.B. Miller, 'Problems in Australian Foreign Policy, January – June 1975', *Australian Journal of Politics and History*, vol. 21, no. 3, 1975, p. 3.

<sup>69</sup> A *Sydney Morning Herald* editorial on 28 April 1976, for example, suggested, "Very many Australians must be deeply angry and ashamed about the callousness of our government's scuttle from Saigon and its abandonment – betrayal is not too strong – of hundreds of Vietnamese entitled to expect our assistance to flee the fate awaiting the marked-down enemies of Hanoi." See also, 'A Government We Cannot Trust' [editorial], *Sydney Morning Herald*, 30 April 1975, p. 2; Miller, 'Problems in Australian Foreign Policy', p. 3.

<sup>70</sup> Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem*.

<sup>71</sup> Viviani, *The Long Journey*, pp. 64-5.

<sup>72</sup> Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem*, p. 21. Also see Joshua Forkert, 'Orphans of Vietnam: A History of Intercountry Adoption Policy and Practice in Australia, 1968-1975', PhD Diss., School of History and Politics, The University of Australia, 2012.

<sup>73</sup> See D.C. Goss, Assistant Secretary South Asian Branch, draft Possible Parliamentary Question, 'Evacuation from Viet Nam: Dennis Warner Allegations', 14 November 1975, NAA, A1838, 3014/10/15/6, Part 4 (see p. 4 of 245 items). These allegations were reported in 'Child Left Behind as RAAF Evacuated Cats – Journalist: Vietnamese Pleaded for Help, Senators Told', *Sydney Morning Herald*, 14 October 1975.

carefully selected by his and Cameron's private secretaries.<sup>74</sup> However, he remained unmoved by the plight of the Vietnamese, reportedly declaring, "Vietnamese sob stories don't wring my withers".<sup>75</sup> A number of the Vietnamese refugees who had worked for the South Vietnamese government were required to sign a declaration that they would not engage in political activity of any kind as a requirement of their entry into Australia. When questioned in Parliament about these restrictions, Whitlam retorted, "the Australian Government does not believe that Australia's hospitality should be abused by people who might want to create difficulties in our relations with other countries".<sup>76</sup> But as Viviani contends, this order was "more revealing of its author's motives than effective in dampening down the political proclivities of Vietnamese".<sup>77</sup> The imposition of the restrictions on the Vietnamese and not other refugees such as the left-leaning Chileans, as the Liberal MP and future Immigration Minister Michael MacKellar pointed out,<sup>78</sup> exposed Whitlam's ideological opposition to the humanitarian admission of Vietnamese refugees while his defence of it in Parliament was indicative of his ongoing campaign to delegitimise their claims on Australia's hospitality.

### 'Boat people'

When the media reported in May 1975 that boatloads of refugees fleeing South Vietnam were preparing to undertake the voyage to Australia,<sup>79</sup> Foreign Minister Don Willesee wrote to Whitlam about his concerns that "the 'spectre of an armada' sailing for Australia will now become the issue which will most attract public opinion and potentially present the greatest

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<sup>74</sup> Cameron, *China, Communism and Coca-Cola*, p. 233. However, according to (differing) figures reported by Nancy Viviani, by the end of 1975, only just over 1,000 had arrived. See Viviani, *The Long Journey*, pp. 64, 85. In his assessment of Australia's actions with respects to the Vietnamese refugees in the first half of 1975, J.D.B. Miller suggests that Australia missed the opportunity to "skim the cream" of the refugees in Guam as the Canadians were accused of doing. See Miller 'Problems in Australian Foreign Policy', p. 5.

<sup>75</sup> From Senate Standing Committee on Foreign Affairs and Defence, Reference: South Vietnamese Refugees, *Official Hansard Report*, 2 vols, Government Printer, 1975 and 1976, p. 246, cited in Viviani, *The Long Journey*, p. 62.

<sup>76</sup> Gough Whitlam, *CPD*, HoR, 3 September 1975.

<sup>77</sup> Viviani, *The Long Journey*, p. 65.

<sup>78</sup> Michael MacKellar, *CPD*, HoR, 2 September 1975, p. 831.

<sup>79</sup> Peter Terry, 'Fleeing South Vietnamese Ships May Risk Voyage to Australia: Federal Govt Takes Tough Stand on Uninvited Refugees', *The Australian*, 6 May 1975.

problem”.<sup>80</sup> Given Whitlam’s feelings towards, and thoughts about, the Vietnamese, this did indeed present a significant dilemma since, in signing the Protocol Relating to the Status of Refugees, Whitlam had committed Australia to the protection of refugees presenting in its territory under the terms of the 1951 UN Refugee Convention. But before his commitment in this regard could be tested, he had famously cursed the Governor-General who had dismissed him from office and been replaced by Malcolm Fraser as Prime Minister. Fraser’s Liberal party then won the subsequent election in December 1975. It was thus Fraser’s Coalition government that dealt with the arrival of the first boat of Vietnamese refugees in Darwin harbour on 27 April 1976.<sup>81</sup> As former diplomat Bruce Grant wrote, “they simply turned up, uninvited, asking for refuge. For Australia, history and geography had merged, causing a shiver of apprehension.”<sup>82</sup> These were precisely the type of refugees Australia had for so long sought to avoid, namely uninvited, unscreened, self-selecting refugees with a legitimate claim on its hospitality under the international human rights instruments it had reluctantly signed. The way Australia responded to these boat-borne refugees is explored in Part III.

Despite the new government, it was inevitable that Australia’s response to the Indochinese situation would be informed by what had come before. As Part II has revealed, in spite of its humanitarian reputation and rhetorical commitment to universal human rights discourse, Australia was a reluctant provider of refuge. In this part of the thesis, I have shown how Australia’s responses to refugees from Federation until this time were directed by its approach to immigration, with the problematic application of immigration principles and practices to the provision of asylum. Australia consistently sought to evade the invocation of its obligations towards would-be asylum seekers under international law, actively protesting the enshrinement in law of the principle of asylum in the first instance and delaying or qualifying its support of international asylum instruments in the second. Australia’s role in

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<sup>80</sup> Don Willesee, letter to Prime Minister Gough Whitlam, 6 May 1975, NAA, A1209, 1975/1156, quoted in Neumann, ‘Oblivious to the Obvious?’, p. 48.

<sup>81</sup> Department of Immigration and Citizenship, Submission to the Joint Select Committee on Australia’s Immigration Detention Network, September 2011, p. 17, <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf>; accessed 13 February 2012. Also see Bruce Grant, ‘After the Exodus’, 29 January 2009, *Inside Story*, <http://inside.org.au/after-the-exodus/>; accessed 1 March 2012.

<sup>82</sup> Bruce Grant, *The Boat People: An Age Investigation*, Penguin, Melbourne, 1979, p. 179.

the establishment of the 1951 Refugee Convention remains a point of pride for the nation and is regularly used by the Australian government when justifying its policies and practices for dealing with asylum seekers. However, as I demonstrate here, Australia's participation in the development of the international system of protection was encouraged by the knowledge that it was, at that time, protected from unwanted asylum claims and principally motivated by regard for its international reputation and concern for the preservation of its discriminatory immigration policies.

Its contribution to refugee protection also focused on avoiding any compromise of these policies, using the provision of financial support and selective resettlement to obscure its weak commitment to asylum, to assuage criticism of its restrictive policies, and to cultivate its reputation as a generous and compassionate nation. However, its "long and proud" history of refugee resettlement belies the fact that Australia resettled refugees only when it suited the national interest to do so, and then only selectively and under specific terms. In the absence of a separate refugee policy, Australia was able to pick and choose, restrict and exclude refugees as the national interest required. Australia could choose to offer its "sympathetic consideration" if and when it suited it to do so (as with the Hungarians) and could use its immigration policies to restrict humanitarian entrants (as it did with the Ugandans and the Vietnamese) to suit political objectives. In those cases where it was in the national interest to open Australia's doors to refugees, it was not the most needy or vulnerable who were welcomed; indeed, they were actively excluded. With rare exceptions (such as the admission of elderly Hungarian refugees), immigration criteria were not compromised to meet humanitarian need, in fact quite the opposite; additional barriers to the entry of unwanted refugees, such as the Jews in the post-war period, were often constructed. Thus Lyons' offer of 15,000 places for Jewish refugees in 1938 was not characteristically generous but rather characteristically self-serving. This decision was shrewdly designed to accrue reputational advantage while actually limiting, rather than increasing, access to Australia for the refugees.

As noted, the absence of a separate refugee policy until the late 1970s was not simply an oversight or by default, but was necessary in order to protect the nation's right to control the composition of its population, to decide who could come to the country and the circumstances under which they came. This is a theme that resonates throughout Australia's

history. As this part of the thesis shows, Howard was drawing on a long and less-than-proud lineage when he uttered those immortal words in 2001. “We will decide” is a slogan that has echoed throughout the ages, repeated by leaders from both sides of politics over the course of the past century. It was at the forefront of the minds of the colonists who saw Federation as a means to control the borders and population. It was explicitly expressed by the architects and advocates of White Australia and reaffirmed by the judiciary who upheld the right to exclude the Pacific Islanders. It motivated Billy Hughes when he fought against the racial equality clause at the Peace Conference in 1919 and was reiterated by Australia’s representative, the aptly named Colonel White, at Evian in 1938. These words defined Australia’s first Immigration Minister, Arthur Calwell, who simultaneously expanded the definition of White Australia and who could come to Australia while fiercely guarding the gate against all others. It explains the disparate responses of the Menzies Government to the Hungarian and West Papuan refugees who sought its assistance. And it was evident in Whitlam’s temporising over the evacuation of orphans and prevaricating about the admission of Vietnamese refugees in 1975.

Australia was founded on the principle of control and this principle dictated its early responses to refugees. It produced a selective humanitarianism focused on the needs of the nation instead of and, indeed, often at the expense of the needs of those seeking its protection. Australia’s historical responses to refugees, though sometimes humanitarian in their outcome, were driven primarily by national self-interest. At best, Australia’s responses to refugees during this period (1901-1975) could be characterised as pragmatic humanitarianism, at worst, parochial complacency. As Part II shows, in this context the past is not a foreign country at all; rather it is a strikingly familiar place. Though its policies and practices have evolved and hardened since, the principles underpinning them remain the same. Australia responded to refugees then as it does now: reluctantly and selectively.



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**PART III**

**THE UNINVITED: THE DEVELOPMENT OF  
REFUGEE AND ASYLUM POLICY 1976-1996**

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*This new situation has all the ingredients  
for one of the most controversial and divisive issues in Australia's history.*

Department of Immigration and Ethnic Affairs  
Cabinet memo on the Indochinese refugee crisis, 1979

### 3.1 Welcome to Australia? A Reappraisal of the Fraser Government's Approach to Refugees, 1975-1983

Until the 1970s, Australia had been effectively fortified from unwanted demands upon its hospitality by a combination of the sheer luck of its geographical peculiarity as an island nation occupying an entire continent in the South Pacific and its carefully crafted immigration policies and selective international commitments as described in Part II. Those to whom it had obligations under the Refugee Convention were unable to access its territory in order to claim asylum without assistance, which meant Australia could pick and choose who it gave its assistance to (for example, the post-war European displaced persons and the Hungarian refugees), while those who were able to access its territory, such as the Papuans, were excluded from its international legal commitments. Australia had encountered and dealt with asylum seekers in the past, but these cases were, for the most part, authorised entrants such as the Hungarian Olympians whose claims could be dealt with quickly and – with the exception of the high profile political defection of the Petrovs – quietly. Unauthorised arrivals in the form of ship jumpers and stowaways were few and infrequent and were dealt with on an *ad hoc* basis away from the public eye.

The arrival of the *Kiến Giang*, which sailed into Darwin Harbour on 27 April 1976 with five Vietnamese asylum seekers on board, therefore marked the beginning of a new era for Australia. These refugees had shown they could reach the great southern land and Australia now had obligations to them that it could not ignore in the event of their arrival nor apply selectively as it had done in the past via controlled resettlement programs. Perhaps more significant, however, was the scale of the Indochinese refugee crisis, which stretched indefinitely into the foreseeable future. For Australia, it meant that the nation was no longer an impenetrable island; its defences had been breached and the old fortress mentality could no longer be sustained, neither morally nor physically. How Australia responded to this new situation is explored in the following article, published in the (ERA 2010 A-ranked) *Australian Journal of International Affairs* in 2015, entitled, 'Welcome to Australia? A Reappraisal of the Fraser Government's Approach to Refugees, 1975-1983'.

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Not applicable.

## Welcome to Australia? A reappraisal of the Fraser government's approach to refugees, 1975–83

KATRINA STATS\*

*The Fraser government's response to the Indo-Chinese refugee crisis and the presentation, for the first time, of asylum-seekers arriving in Australia by boat is almost universally acclaimed as having been proactive, generous and humanitarian in spirit—the antithesis of both the preceding Whitlam Labor government and subsequent governments, particularly since 2001. Adopting a policy of 'forward selection' of refugees from camps in South-East Asia, the Fraser government was able to stem the flow of boats and oversaw the relatively uncontroversial resettlement of nearly 70,000 Indo-Chinese. However, the author argues that this was not the brave and principled course of action for which Fraser and his immigration ministers are regularly fêted, but rather a delayed response that was motivated by fear and desperation rather than pure humanitarian intent. The celebrated outcomes of Fraser's policies belie the self-interested way in which they were constructed and neglect the fact that the government did not act until it was forced. Fraser's policies were neither a departure from the past nor the antithesis of current policies; to the contrary, they were the seeds of the contemporary Australian model of asylum.*

**Keywords:** asylum seekers; Australian refugee policy; Indo-Chinese refugee crisis; Malcolm Fraser

### Welcome to Australia!

In 1977, Hieu Van Le and his wife Lan secretly boarded a small fishing boat and set sail south from Vietnam. Hieu had been born in the year that the Vietnam War began and conflict had been a normal part of his daily experience. As he recalls: 'from the day that I was born to the day I left the country I did not remember a day without hearing the gunshots, the rockets, the attacks, and without a day seeing other people killed' (quoted in Henschke 2007). Having survived the bloody conflict that had claimed so many of their family and friends, Hieu and Lan fled their homeland at the war's conclusion, like many others, to escape the victorious communist regime and the threat of

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‘re-education’ and reprisals. Initially they made for neighbouring Malaysia and Singapore, but were repeatedly and aggressively pushed out to sea again by the coastguards of these countries, which were struggling under the burden of the existing refugee population sheltering within their borders. Eventually, in desperation, Hieu and his companions swam to the Malaysian shoreline and languished thereafter in the squalid conditions of an overburdened refugee camp. Gradually losing hope of resettlement as the number of refugees continued to rise at a rate that far exceeded the limited number of resettlement places offered by Western governments, they ‘took to the sea again, the lonely sea and the sky in a fragile boat [with] little more than a compass and star to steer her by’, this time headed for Australia (Le 2011).

Hieu recalls how, after three days at sea, they approached the ‘promised land’ both nervously and hopefully:

After many horrific experiences with coastguards in Southeast Asia, we were apprehensive as to what kind of reception we would now receive. We chugged clumsily into the harbour, then heard the approaching buzz of an outboard motor. It’s the coastguard again, we thought, and we braced ourselves, while some even said a little prayer. Gradually, emerging out of the morning mist, we saw a ‘tinnie’, with two blokes with shorts and singlets in it, sun hats on, white zinc cream on their noses, fishing rods primed and sticking up in the air and the first beers of the day were in their hands. They looked like ‘extras’ from the old Barry McKenzie film! They waved at us and steered their boat very close to ours, and one of them raised his stubby as if proposing a toast. ‘G’day, mate’, he shouted. ‘Welcome to Australia!’ (ibid.).

Hieu Van Le went on to become the lieutenant governor of South Australia and chairman of the South Australian Multicultural and Ethnic Affairs Commission in 2007. In 2010, he was awarded an Order of Australia for his services enhancing multiculturalism in his adopted nation and, in September 2014, he became the governor of South Australia. He regards himself as

someone whose circumstance has gathered to this land—one to whom a great generosity of spirit has been given, to whom a new and rich identity has been accorded. I feel myself to be an embodiment of the immigrant experience—the beneficiary of the imagination of this nation (ibid.).

In fact, Le’s immigrant experience was *not* typical of the Indo-Chinese who came to Australia—less than 2500 of the 70,000 Indo-Chinese refugees who came to Australia during the Fraser era arrived by boat—but it is instructive in other ways. His personal story embodies the way in which Australia’s response to the Indo-Chinese refugee crisis is remembered as generous and welcoming. In power from the end of 1975, Prime Minister Malcolm Fraser is remembered for choosing an approach that is almost universally acclaimed as having been

proactive, generous, effective and humanitarian in spirit, and thus antithetical to that of the preceding Whitlam Labor government, which was widely criticised for its 'blameworthy dilatoriness' in evacuating eligible Vietnamese refugees following the fall of Saigon in April 1975 (Miller 1975, 3). Historian Don McMaster (2002, 71), for example, suggests that the Fraser government 'responded speedily and efficiently to the refugee situation'; lawyer and refugee advocate Julian Burnside (2012) recalls how the Vietnamese 'were resettled here swiftly and without fuss, thanks to the simple human decency which Malcolm Fraser and [Minister for Immigration and Ethnic Affairs] Ian Macphree showed'; and the former secretary of the Department of Immigration, John Menadue, asserts that: 'under Malcolm Fraser's Prime Ministership ... Australia performed wonderfully in accepting tens of thousands of Indo-Chinese refugees' (Menadue, Keski-Nummi, and Gauthier 2011, 18). Lamenting the politics of fear to which he alleges Fraser's conservative prime ministerial successor, John Howard, succumbed and perpetuated for his advantage, Menadue (2009) claims that Fraser 'showed leadership in "encouraging the better angels of our nature". We now look back with pride that through [his] leadership we helped not only refugees, but also ourselves'.<sup>1</sup> Even Fraser himself (*Age*, March 26, 2012; Fraser 2012; Fraser 2013), now a passionate and vociferous advocate for asylum-seekers and refugees, could not resist perpetuating the popular memory of his legacy by distancing his approach from that of John Howard's Coalition government, which in its second and third terms enacted a range of harsher measures aimed at deterring onshore asylum-seekers, and that of the current Coalition government led by Tony Abbott.

While their assertions regarding the *outcomes* of Fraser's approach are valid—between 1976 and 1982, nearly 70,000 Indo-Chinese were resettled in Australia and approximately 80,000 came afterwards via the Orderly Departure Program and immigration channels established by the Fraser government (DIAC 2009, 22)—I argue that this was not the brave and principled course of action for which Fraser and his immigration ministers are regularly fêted. Rather, it was a delayed and somewhat desperate response that the government adopted only when the national interest was threatened by the possibility of 'invasion' by boat people. The government's initial reluctance to act, and then its careful selection of refugees from overseas camps, meant that it could appear to be exercising control over both the flow and the quality of migrants, who were selected according to their ability to contribute to, and integrate with, the nation, rather than simply their need for refuge and security. Elsewhere, I have demonstrated how early Australian governments, in dealing with the Jewish refugee crisis in the 1930s and the resettlement of displaced persons after World War II, failed to distinguish between the particular needs of desperate refugees and the broader governing imperatives of the nation's immigration policy (Stats 2014). This article argues that, in many respects, the same was true of Fraser's government in response to the Indo-Chinese.

The purpose of this reassessment of the Fraser government's response to the Indo-Chinese refugees is neither to denigrate the outcomes of its policies nor to undermine the importance of Malcolm Fraser's current refugee advocacy. Rather, it is to remind those who regard the Fraser era as an exception to Australia's otherwise poor refugee record or, alternatively, as the pinnacle of Australia's humanitarianism that Fraser and his ministers were acting under a similar set of constraints, with similar motivations to governments past and present. Idealising the past makes it difficult to compare it meaningfully to the current situation and draw useful lessons from it. To suggest that Fraser's success in dealing with Australia's first boat 'crisis' was merely a case of brave leadership and principled action, for example, makes it hard to imagine how any of today's poll-driven and poll-dependent leaders could choose a similar course. Indeed, former Labor leader Kevin Rudd (2010) suggested that his 'tough but humane' approach to asylum-seekers was, at least in part, responsible for his replacement by Julia Gillard as prime minister in 2010. It is more important to understand how, with similar objectives, motivations, pressures and constraints, the Fraser government nevertheless eventually produced a 'solution' that served both humanitarian and national interests.

### **The Indo-Chinese refugee crisis**

The Indo-Chinese refugee crisis was the product of a series of communist victories in the former French colonies of Indo-China in 1975. In Cambodia (then Kampuchea), Phnom Pehn fell to the Khmer Rouge led by Pol Pot on April 17, 1975, after which the Khmer Rouge enacted a program of genocide, causing many to flee across the border to Thailand. The Vietnam War ended shortly afterwards, following the fall of Saigon at the end of April, and refugees from South Vietnam began to flee the victorious communist regime, taking to the seas in order to seek asylum in neighbouring South-East Asian countries. Then, in December 1975, the Pathet Lao overthrew the royalist government in Laos and established the Lao People's Democratic Republic, causing hundreds of thousands of Laotians to flee to Thailand. Persecution, reprisals, forced expulsion and brutal genocide caused more than three million people to flee Vietnam, Cambodia and Laos over the next two decades (UNHCR 2000, 79). None of the neighbouring countries in South-East Asia that became countries of first asylum to the majority of these refugees were signatories to the United Nations (UN) Refugee Convention, and hence had no obligation to admit or resettle the refugees, but they agreed to accommodate them temporarily with the promise of assistance from, and resettlement in, Western countries, primarily the USA, France, Canada and Australia.<sup>2</sup> The governments of these states acknowledged both a general obligation to contribute to the relief efforts because of their commitment to international human rights and refugee instruments and a particular moral obligation due to their involvement in the conflict. As Fraser later explained: 'We'd been fighting alongside these people ... we had a moral



obligation to help as many as possible come here as refugees' (quoted in Thompson 2007). Australia was also implicated on account of its geographical proximity; not only did the crisis threaten the stability of the region to which Australia reluctantly belonged, but its proximity also meant that Australia found itself a country of first asylum for the first time. The Indo-Chinese refugee crisis thus provided the first real test of Australia's commitment to the human rights instruments and international refugee law that it had subscribed to.

### **The response of the Whitlam government**

Although Whitlam's government had been responsible for signing the UN Protocol Relating to the Status of Refugees, which formally committed Australia, for the first time, to obligations to non-European refugees and asylum-seekers, and for enacting the Racial Discrimination Act 1975, which categorically completed the task of dismantling the White Australia policy, he was not sympathetic to the plight of the Vietnamese, whose 'sob stories', he reportedly declared, 'don't wring my withers' (Viviani 1984, 62). Concerned both about antagonising North Vietnam and an influx to Australia of anti-communist refugees who were more likely to support the conservative opposition, Whitlam (1978) suggested that those fleeing South Vietnam were predominantly economic migrants seeking 'an easy life', and vigorously resisted their admission to Australia. He initially vetoed plans to evacuate orphaned children from Saigon for fear it might set a precedent for the evacuation of adult refugees, though he later relented under domestic pressure from community groups (such as the Australian Society for Intercountry Aid for Children and Friends for All Children), the press and the opposition, and to avoid embarrassment after the USA announced its own 'Babylift' operation (Forkert 2012; Senate Standing Committee on Foreign Affairs and Defence 1976, 5; Viviani 1984, 58). He also delayed announcing the categories of Vietnamese people eligible for temporary residence in Australia until just two days before the closure of the Australian embassy in Saigon, despite advance warning of the imminent fall of Saigon (DFA 1975). As a result, by the time the embassy was evacuated three days later, of 3667 nominations, only 366 Vietnamese nationals had been approved for entry into Australia, and only 342 of these had been advised of their approval. Ultimately, only 78 could be located in time for the evacuation (Senate Standing Committee on Foreign Affairs and Defence 1976, 21).

The Liberal Country coalition accused the government of 'politically motivated procrastination' (Fraser 1975) and of acting with 'shameful indifference' towards the South Vietnamese refugees (MacKellar 1975). The reaction of the Whitlam government to the refugee exodus was subsequently subject to official rebuke in a report by the Senate Standing Committee on Foreign Affairs and Defence presented in December 1976. The report, *Australia and the Refugee Problem*, had been commissioned in June 1975 to review Australia's response to the

Indo-Chinese crisis, with a view to guiding its ongoing contributions to the relief effort. The committee was critical of the slow and limited response of the Whitlam government, which, it concluded, had been deliberately hesitant and, as a result, had cost lives. The committee highlighted the ‘complete lack of policy for the acceptance of people into Australia as refugees’, and the need to ‘differentiate clearly between refugees and migrants in the future’ (Senate Standing Committee on Foreign Affairs and Defence 1976, 25). It recommended the establishment of ‘an approved and comprehensive set of policy guidelines and ... appropriate machinery’ (89) to deal with refugee situations.

### **The Fraser government’s refugee policy—a new era?**

The Liberal Country coalition’s unrelenting criticism while in opposition and pressure on the government to take substantial numbers of refugees suggested that, once it came to power in late 1975, it would adopt a more compassionate and generous approach towards the refugees. Certainly, the Fraser government acted promptly on the Senate Standing Committee’s recommendations, which fed into the refugee policy that was announced by the Minister for Immigration and Ethnic Affairs, Michael MacKellar, in May 1977. Significantly, the government’s policy acknowledged that refugees were not ‘a temporary post-war phenomenon’, but an ongoing reality of the contemporary global political environment, and that Australia had a humanitarian commitment and responsibility to admit refugees for resettlement (MacKellar 1977, 1713). It was the first time that an Australian government had formally acknowledged the crucial distinction between immigration policy, which is ‘pragmatic and self-interested’ and motivated by the ‘economic, social and cultural enrichment of a society and its people both home-born and migrants’, and asylum policy, which, on the other hand, is about ‘providing refuge, security, freedom and hope’ (MacKellar 1978). Moreover, it recognised ‘that a refugee policy presents the challenge of accepting people who will have problems and involve costs’ (ibid.). In order to transform these principles into practice, a dedicated Refugee and Special Programs Branch was set up within the Department of Immigration to provide the bureaucratic apparatus for dealing with refugees; a Standing Interdepartmental Committee on Refugees was created to advise the Minister for Immigration and Ethnic Affairs; and the interdepartmental Determination of Refugee Status Committee was established in March 1978 to help assess refugee claims in a fair and consistent manner (York 2003, 19). The new humanitarian program was designed to deal with both offshore refugees awaiting resettlement and onshore asylum-seekers in a controlled fashion. In order to control the latter, the government adopted a policy of ‘forward selection’ (Marr and Wilkinson 2003, 46), choosing refugees for resettlement from the camps across South-East Asia in order to forestall the departure of boats (this policy will be explained and examined shortly).

These developments suggested a departure from the ad hoc and self-interested approach of the past, under which refugees had been selected on their suitability, and admitted under the same conditions, as migrants (Stats 2014), to a planned and principled humanitarian program of generous proportions. But far from being driven by humanitarian intent, the Fraser government's response to the Indo-Chinese crisis was, like that of both preceding and succeeding Australian governments, primarily motivated by fear of the political consequences of an uncontrolled refugee influx, and was a reactive rather than principled response, as is often suggested. The celebrated outcomes of Fraser's policies belie the self-interested way in which the policies were constructed, and neglect the fact that the government did not act until it was forced to by the arrival of refugees on Australia's shores. Fraser's policies were neither a departure from the past nor the antithesis of current policies; to the contrary, they were the seeds of the contemporary Australian model of asylum.

### Reassessing the Fraser government's record

If the Fraser government was motivated by an overwhelming sense of moral obligation towards the Indo-Chinese refugees on account of Australia's participation in the Vietnam War, as Fraser later suggested (see Kelly 2001, 33), then it certainly took some time—and a steady stream of boats—for it to kick in. In opposition, Fraser had called on Whitlam to allow 'several thousand' Vietnamese refugees to come to Australia, and described the government's efforts as 'pathetic and utterly inadequate' (quoted in Age, April 7, 1975, 1). Despite this criticism, once in office, Fraser's initial response to the building crisis was cautious and limited. In January 1976, the Minister for Immigration and Ethnic Affairs, Michael MacKellar, announced that Australia would take up to 800 refugees with family or other links to Australia from camps in Thailand, and he announced an additional 550 places in November. The requirement that these people have existing links to Australia, however, limited the number of eligible refugees and thus rendered it little more than a token gesture; by the end of 1976, Australia had resettled just 754 refugees (Viviani 1984, 85). Meanwhile, three boats carrying a total of 111 refugees had arrived in April, November and December 1976 (Viviani 1984, 68–69, 85). A reluctant country of resettlement, Australia had now become an unwitting and unwilling country of first asylum, with obligations towards the refugees stemming from its commitment to the 1951 UN Refugee Convention.

The first couple of boats coming to Australia were received quietly and without fuss. However, as more boats continued to arrive, some media outlets began to express concerns about the trickle turning into a tide (see, for example, *Sun-News Pictorial*, December 22, 1976), fuelling domestic disquiet (*Dispatch*, December 15, 1977, 10). Entering what was to be an election year, the government was understandably nervous. While it had been comfortable allowing the first few boatloads carrying relatively small numbers of refugees

to settle into the community, the government responded defensively to the threat of large numbers coming via organised rescue operations by ships such as the *Roland*, which had been chartered by the World Conference on Religion and Peace to collect refugees at sea and disembark them safely en masse, potentially in Australia, in January 1977. According to MacKellar, this kind of operation ‘change[d] the entire ballgame’ (*Age*, February 1, 1977, 1). He hinted that the government would not continue to guarantee entry to boat arrivals, saying that Australia’s sympathetic approach ‘should not be construed by anyone as a guarantee of permanent residence here for anyone who turns up’ (*ibid.*). It was subsequently announced that future boat arrivals would only be provided with temporary visas, in the hope of deterring them (Price 1981, 103). The *Roland* found itself in limbo after it experienced engine trouble, but was barred from docking in Malaysia unless resettlement places could be guaranteed for all the refugees. Furthermore, Malaysia reportedly pressed for four resettlement places for refugees from its camps for every three who were disembarked from the ship (*Age*, February 15, 1977, 6). Australia agreed to take 150 of the *Roland*’s passengers, who were eventually disembarked in Malaysia in June 1977. Although the Australian government was effectively bullied into this position by the Malaysian government, it was preferable to having the refugees brought to Australia in the first instance, which would leave it with little choice but to take them. In this way, it managed to retain the perception of control over its borders and simultaneously appear to be doing its ‘fair share’ by making generous exceptions for a few—a lesson that was later adopted on a larger scale.

In the meantime, the government, realising its ad hoc approach was inadequate in the face of the growing crisis, began to develop a formal policy. MacKellar’s announcement in May 1977 was Australia’s first official refugee policy, but it was not, as is often contended, a departure from either the past nor unrelated to what was to come. At the same time as it affirmed Australia’s humanitarian responsibility to admit refugees for resettlement, it simultaneously reasserted the government’s sovereign right to select and reject humanitarian entrants according to the national interest. While it separated refugee policy from immigration, it noted that refugee selection, like migrant selection, would take into account such factors as the state of the economy and level of unemployment, and the background of the refugees—i.e. ‘their capacity for integration or otherwise’ (MacKellar 1977, 1714). The message that Australia had a limited capacity to resettle refugees, and that it ‘would have to tailor its refugee policy to fit its economic capacity’ and select the most likely to integrate successfully, was constantly reinforced by MacKellar over the subsequent months (*Age*, September 20, 1977, 1; July 23, 1979, 7; *Sydney Morning Herald*, December 12, 1978, 2).

MacKellar’s policy announcement conspicuously lacked a concrete commitment to refugee quotas and instead concentrated on the need to balance Australia’s limited capacity to resettle refugees responsibly with demands on its hospitality. With no stated quotas, Australia’s approach was thus still reactive

and ad hoc, and it had little impact on the flow of boats. Four more boats arrived in June and July 1977—one undetected, which caused considerable consternation. In late July 1977, MacKellar announced that Australia would station two immigration staff in Bangkok to facilitate Australia's refugee intake from the Thai refugee camps. But when refugee numbers in Thailand approached 100,000, the Thai government refused to accept any more boat arrivals, instead providing them with fuel and supplies, and pushing them back out to sea. Malaysia, too, began to push back boats, as Hieu Van Le and his companions experienced first-hand, and many refugees in the camps, losing hope of resettlement, began to embark on onward journeys. The Singaporean government had openly encouraged refugees to head to 'more salubrious countries', such as 'the great wealthy continent of Australia', since the very beginning of the crisis (Viviani 1984, 63–64). Later, the Singaporean authorities forced boats to continue on, with troops firing rounds into the air to deter boat landings (*Age*, November 6, 2009, 13). As a result, boat arrivals in Australia escalated in the lead-up to the election in December 1977, threatening the government's chances of re-election. In November alone, 302 refugees—constituting nearly half the total boat arrivals at this time—arrived by boat, with six boats carrying 218 people arriving on a single day, making headlines across the nation (see, for example, *Age*, November 22, 1977, 1).

During this time, Australian immigration officer Greg Humphries was stationed in Malaysia and tasked with preventing the departure of boats carrying refugees to Australia. As he recalled: 'If the boat was un-seaworthy, the Malaysians were very sympathetic and they'd allow them to land and go into a camp. But if the boat was seaworthy, they'd say, "On your way ... we've got enough"' (Martin 1989, 95). Humphries confessed that, 'on many occasions', he and other Department of Immigration staff therefore sabotaged refugee boats in Malaysia (Martin 1989, 109). Interviewed for Alex Morgan's 1992 documentary *Admission Impossible*, he explained: 'We bored holes in the bottom of the ships, of the boats, and they sank overnight, so they had to be landed. And we were very successful in stopping many of the boats, by one way or another' (Smit 2010, 89).

With the federal election looming, the Labor opposition added pressure, with the Australian Labor Party immigration spokesperson Senator Mulvihill suggesting that 'the Government had lost its selectivity on Indo-Chinese refugees when there could be other refugees under greater political duress' (*Age*, November 22, 1977, 1). He suggested that Australia, too, should start turning back the boats, and implied that a Labor government would do just that (*Age*, November 30, 1977, 1). It was Whitlam who first explicitly conjured up the image of a 'queue' when he suggested that the government 'should also see that [boat arrivals] don't get ahead in the queue over people who have been sponsored and who are already coming here' (Henderson 2002, 86). Similarly, in words later echoed by John Howard, the then president of the Australian Labor Party, Bob Hawke, remarked:

Of course we should have compassion, but people who are coming in this way [by boat] are not the only people in the world who have rights to our compassion. Any sovereign nation has the right to determine how it will exercise its compassion and how it will increase its population (*Australian*, November 29, 1977, 1).

Polls taken in early December 1977 showed that the vast majority of Australians thought that the boat arrivals should not be allowed to stay in Australia permanently (19.7 percent) or that their numbers should be limited (60.3 percent) (Morgan Gallup 1977).

However, while the Minister for Transport, Peter Nixon, suggested in early December that boat arrivals might be refused entry and that MacKellar had instructed the selection officers in the camps in South-East Asia to spread this message throughout the camps (*Age*, December 8, 1977, 1), turning back the boats was never a viable option for the government on account of its international protection obligations under the UN Refugee Convention. MacKellar denied that he had issued orders to turn boats back, but he certainly intended to convey a clear message to refugees awaiting resettlement in the camps when he sent additional support to the refugee selection team in Thailand and deployed selection teams to Malaysia and Singapore as well in November 1977. Though there was no concomitant announcement of an increase in resettlement numbers, the selection teams' presence in the camps was intended to suggest as much, with a view to discouraging refugees from embarking on sea voyages. In December, MacKellar announced that 1000 refugees from Malaysia, where most of the boats coming to Australia were originating, would be flown to Australia for resettlement (Viviani 1984, 78). Three months later, in March 1978, MacKellar announced that Australia would accept a further 2000 refugees from Thai and Malaysian camps. Around the same time, the Determination of Refugee Status Committee was established, ostensibly to assess onshore asylum claims fairly and consistently, but primarily to assuage public concerns, stirred by the press and the opposition, that many of the people arriving by boat were not genuine refugees (Stevens 2012, 532; Viviani 1984, 80).

### **Holding the boats: containment and cooperation**

The refugee crisis intensified when the Vietnamese government began a sustained campaign of economic sanctions against the predominantly ethnic Chinese 'bourgeois trade' in Ho Chi Minh City in March 1978. Australia came under increased pressure both from countries of the Association of Southeast Asian Nations (ASEAN) and the USA to increase its refugee intake again. With the help of the US vice-president, Walter Mondale, MacKellar brokered a deal with the Indonesian government to hold refugee boats headed to Australia until they could be processed in an orderly and controlled fashion for resettlement in

Australia. In return, Australia agreed to resettle 9000 Indo-Chinese refugees in 1978–9 (Price 1981, 103). Although this effectively condoned ‘queue-jumping’, as a Cabinet document explained: ‘Our immediate objective in accepting primarily boat people was to attempt to stop the arrival, unannounced, of refugee boats on our northern shores’ (Peacock 1978, 4). The strategy appeared to be temporarily successful, with just one boat arrival in four months; however, with pressure building again in Thailand and Malaysia and threatening to spill over in Australia’s direction, there was an acute awareness of the need to construct a more comprehensive solution and to seek greater international cooperation. So, while MacKellar worked on containment, Andrew Peacock, the Minister for Foreign Affairs, pursued the cooperation strategy by initiating international consultations to generate global burden-sharing solutions to the Indo-Chinese refugee crisis. This led to an international conference in Geneva on December 11–12, 1978, at which Australia announced an increase in its refugee intake for 1978–9 to 10,500 and a similar commitment for the following year, as well as an additional contribution of US\$3 million to the UN High Commissioner for Refugees’ (UNHCR’s) program of assistance for the Indo-Chinese refugees (Peacock 1978, 9; *Sydney Morning Herald*, December 12, 1978, 2). However, the conference failed to ‘internationalise the resettlement effort’ as Australia had hoped (Peacock 1978, 5). Although it increased the total number of pledged resettlement places to more than 80,000 and generated an additional US\$12 million in contributions to the UNHCR, it did not produce any additional resettlement nations and produced only 4000 extra resettlement places (*Age*, December 14, 1978, 1, 11). These contributions proved insufficient, as the refugee exodus continued to grow after Vietnam invaded Cambodia in December 1978 and China invaded Vietnam in February 1979, instigating the third Indo-China (or Sino-Vietnamese) War. As a result of these conflicts, the numbers of land and boat refugees flowing into countries of first asylum in South-East Asia jumped from an average of 7398 per month in 1978 to 27,767 per month in 1979 (Stein 1979, 716).

Nevertheless, the substantial increase in Australia’s intake proved successful in discouraging spontaneous arrivals. Unauthorised arrivals by boat dropped from 746 people in 1978 to 304 people in 1979, and there were no registered boat arrivals the following year (Viviani 1984, 85). As well as stopping the boats and thus quelling public disquiet, there was an additional benefit of the decision to increase the refugee intake: privileging resettlement over asylum also allowed Australia to exercise discretion over its humanitarian intake. Indeed, at the Geneva conference, the Malaysian Minister for Home Affairs, Ghzali Shafie, expressed annoyance at the way Australia’s selection procedures allowed it to select the most desirable refugees (as it had after World War II with the displaced persons), leaving Malaysia with the ‘scum’ and ‘dregs’ of the refugee population (*Age*, December 14, 1978, 7, 11). MacKellar rejected this criticism, arguing that since Australia had a limited resettlement capacity, it was necessary to apply selection criteria of some sort. As he explained: ‘We give first priority

to family reunion, second priority to people who have been associated with or worked with Australians in the region, third priority to those with skills useable in Australia and fourth priority to special compassionate cases' (*Age*, December 14, 1978, 7).

Not only did the increased intake help to curb the boat arrivals, but it also transformed the way the refugees arriving by boat were depicted. The opening up of official channels for resettlement effectively constructed the proverbial 'queue', which resulted in a pejorative distinction between the resettled refugees, who were carefully selected and controllable and thus deserving of Australia's benevolence, and the unwanted boat arrivals, who were now viewed as impatient queue jumpers (see, for example, *Australian*, June 29, 1978). This construct subsequently proved useful not only to Fraser's political successors, who would use it to delegitimise the unwanted claims of asylum-seekers and to justify their incarceration and other punitive measures imposed on them, but also to the Fraser government. It allowed the government simultaneously to tighten its definition of a refugee (i.e. someone who waited patiently for resettlement via the official channels) and secure the nation's borders against the unwanted, self-selecting boat arrivals. When large commercial vessels ferrying thousands of refugees loomed heavily on the horizon in late 1978 and early 1979, the suspicion that the fee-paying passengers were 'illegal immigrants' seeking a better life rather than bona fide refugees was used by the government as a release from the automatic acceptance of all arrivals demanded by its international legal obligations to refugees. In response to reports of such large-scale commercial ventures, MacKellar declared that Australia would not accept any cases involving 'subterfuge' (*Age*, December 11, 1978, 11). After Fraser voiced concerns that the Vietnamese government was engaging in a 'concerted and active policy ... to export people' who opposed the regime (*Sydney Morning Herald*, January 4, 1979, 8) during a visit to the USA in early January 1979, MacKellar reaffirmed the government's position that it 'would under no circumstances allow refugees on these ships into the country' (*Age*, January 5, 1979, 1).

### Warning shots from ASEAN

Although the number of resettlement places increased after the 1978 UN conference in Geneva, so too did refugee numbers. In the first six months of 1979, 209,000 refugees were registered, with at least another 50,000 unregistered Cambodian refugees in Thailand (Stein 1979, 717). In June, the Thai government returned 42,000 Cambodians (*ibid.*), while the Malaysian deputy prime minister, Dr Mahatir Mohammed, declared that future boat arrivals would be shot on sight (Milner and Mauzy 1999, 184). A second international conference was convened in Geneva in July 1979 after the five ASEAN countries issued a joint communiqué announcing that, having 'reached the limit of their endurance', they would not accept any new arrivals (ASEAN 1979). They also



threatened to expel the existing refugee population in their camps unless they were guaranteed resettlement elsewhere. The announcement was intended to put pressure both on Vietnam, as the source of the problem, and the international community, with whom they 'expressed disappointment at the inadequacy of their efforts in relation to [the] growing magnitude of the problem' (ibid.). It placed particular pressure on Australia, which, on account of its proximity, its expansive and largely unpatrollable borders, and its international legal obligations, was likely to be the unfortunate beneficiary of the border closures in Asia. Cabinet documents from the time reveal that the government was acutely aware that 'this new situation [had] all the ingredients for one of the most controversial and divisive issues in Australia's history' (DIEA 1979, 1). These Cabinet documents suggest that the government was primarily concerned about 'retaining and being seen to retain maximum, effective control over the entry of people, including refugees, into Australia', and 'not coming to be regarded as a natural or inevitable destination for large numbers of refugees from Asia' (DIEA 1979, 5). As a large and wealthy developed country with a small population relative to its geographical size, the government anticipated great pressure to increase its intake, and was aware that intransigence would risk conflict with its ASEAN neighbours and 'courting international pariah status' (DIEA 1979, 13). It was suggested that the most effective way for Australia to protect and serve its national interests was 'to shift the emphasis of its policy from resettlement to staunching the flow at its source' (DIEA 1979, 2). Accordingly, in his address at the 1979 Geneva conference, MacKellar (1979a) argued that: 'Each nation must be free to make its own decision about the people it will admit, the numbers and the rate of admission'. He also made a point of noting that: 'these continuing conferences are going close to accepting in fact, if not formally, the proposition that a country might with impunity expel its ethnic minorities' (ibid.).

In a powerful address at the conference, the US vice-president, Walter Mondale (1979), reminded delegates of the international community's failures at the Evian Conference in 1938, at which all but one of the delegate countries failed to accept greater responsibility for accommodating Jews who were fleeing Nazi Germany, and implored: 'Let us not re-enact their error. Let us not be heirs to their shame'. This second conference was more successful than the first. In return for a commitment on the part of the Vietnamese government to make every effort to stop illegal departures, Western resettlement countries pledged 280,000 resettlement places before the end of June 1980, of which Australia contributed 14,000—an increase of 3500—and promised the same for 1980–1 (Age, July 23, 1979, 7; Viviani 1984, 104). Boat departures subsequently dropped by two-thirds in 1980 (Bronée 1993, 536). There were no registered boat arrivals in Australia that year and just one registered refugee boat in 1981.

Having succeeded, at least temporarily, in stopping the flow of boats, the Fraser government then acted quickly to shore up its defences against further unwanted arrivals. At the international level, Australia pushed for the development and institution of a new concept of temporary refuge to help deal with

situations of large-scale influxes. A proposal for temporary protection was first tabled by the Australian delegation at the Sub-Committee of the Whole on International Protection in Geneva on October 2–3, 1980, and again in December 1980 at the Special Political Committee of the UN General Assembly (DFAT 1980; Coles 1983). It was promoted with more success in 1982 at a meeting of the Executive Committee of the UNHCR, where the *concept* of ‘temporary refuge’ was unanimously endorsed by the committee (DIAC 2011). However, as Fonteyne notes, the UNHCR resisted endorsing the *institution* of temporary protection for fear

that the formalisation of the practice of States in granting temporary, as opposed to permanent, refuge might be counter-productive in ‘legitimising’ attitudes of lesser, rather than greater, effort on the part of States in the provision of protection to persons in need (Fonteyne 1983, 175).

At the domestic level, the government introduced new legislation—the *Immigration (Unauthorised Arrivals) Act 1980*—which allowed for the detention of unauthorised arrivals and introduced heavy penalties for the transport of undocumented migrants. Although the law ostensibly targeted the operators of suspected commercial ventures ferrying fee-paying ‘economic refugees’ to Australia ‘without invitation’ (Macphee 1980), rather than the passengers themselves (in a concession to Article 31 of the UN Refugee Convention, which prohibits the imposition of penalties on entering a country unauthorised for the purposes of seeking asylum [Fraser and Simons 2010, 419]), in early submissions for Cabinet prepared by the Department of Immigration, the proposed legislation was revealingly referred to as ‘Legislation against Unauthorised Boat Arrivals’ (MacKellar 1979b).

These steps marked a change in attitude towards the Indo-Chinese, which was formalised when MacKellar’s successor, Ian Macphee, rejected the UNHCR’s group mandate status for the Indo-Chinese in March 1982, arguing

that a proportion of people now leaving their homelands were doing so to seek a better way of life rather than to escape some form of persecution. ... To accept them as refugees would in effect condone queue-jumping as migrants (Macphee 1982).

Individual refugee assessments gave the government a greater opportunity to be more selective; indeed, this was evident in Australia’s refugee intake in 1982, which dropped by almost a third from previous years (Viviani 1984, 112). In 1982, the government negotiated the Orderly Departure Program with the Vietnamese government in order to allow relatives of Vietnamese Australians to migrate legally to Australia, under which some 4000 Vietnamese came to Australia over the next three years (Meredith and Dyster 1999, 264). With the refugee crisis effectively contained, for Australia at least, the government began to diversify the refugee intake, particularly with those from Central and Latin

America via the Special Humanitarian Program, to avoid upsetting the US government, which was not prepared to recognise these humanitarian entrants as refugees because of political sensitivities. The Special Humanitarian Program was established in the second half of 1981 to provide resettlement opportunities for people outside their home country, with family or community links to Australia, who were subject to substantial discrimination amounting to a gross violation of human rights, but did not meet the strict definition of a refugee or the ordinary migrant selection criteria (Macphee 1981). Having controlled spontaneous arrivals and established the Orderly Departure Program with Vietnam, the Special Humanitarian Program allowed the Australian government more flexibility in selecting its humanitarian applicants. Critics viewed the Special Humanitarian Program and Special Assistance Program as 'disguised immigration programs' (McMaster 2002, 58–59).

## Conclusion

At the UN Conference on Indo-Chinese Refugees in Geneva in 1979, the US vice-president, Walter Mondale (1979), had warned that: 'History will not forgive us if we fail. History will not forget us if we succeed'. History has treated Fraser well, and not without good reason. Australia's response to the Indo-Chinese refugee crisis was ultimately generous in scope and had significant positive outcomes, both for the nation and for those who joined it (see Hugo *et al.* 2011). The Fraser government's decision to increase substantially its humanitarian intake meant that the vast majority of the 150,000 Indo-Chinese who came to Australia in the 1970s and 1980s were able to forgo risky sea voyages in exchange for the promise of resettlement. It was a wise and responsible course of action, but it was not the brave and principled response which is regularly fêted. Under Fraser, boat arrivals like Hieu Van Le were not welcomed with open arms and in generous numbers, as is sometimes suggested. The government did not rush to alleviate the refugee burden being shouldered by the countries of first asylum in South-East Asia. Its initial response was cautious and limited. The Fraser government only accepted significant numbers of refugees for resettlement after the arrival of boats on Australia's own shores unsettled the public and threatened its chances of re-election. As Fraser himself acknowledged, the government's willingness to accept more people grew not with the scale of the refugee crisis, but with the number of boat arrivals (Fraser and Simons 2010, 420).

Like previous Australian governments, in constructing its response to the Indo-Chinese, the Fraser government was motivated by its international reputation and the desire to maintain control, or the perception of it, over who could come to Australia and how they came (Stats 2014). The careful selection of refugees from the camps meant that, though the numbers were large, the government could appear to be exercising control both over the flow and the quality of migrants, who were, as they had been in the past (*ibid.*), selected

according to their ability to contribute to, and integrate with, the nation, rather than simply their need for refuge and security. The Fraser government's response was not only consistent with the past, but also contained the antecedents of some of the most controversial aspects of the contemporary Australian model of asylum: the outsourcing of asylum and offshore processing (i.e. boat-holding in Indonesia), as well as punitive deterrence strategies such as detention and temporary protection. The Labor governments of Hawke and Keating, especially after 1990, extended these measures (Jupp 2002, 46–52). Thus, when the Howard government cobbled together the controversial Pacific Solution in 2001, it was not, as is often claimed, redefining, but simply refining the Australian model of asylum.<sup>3</sup>

The government's top priority during Fraser's prime ministership was, as it is now, to stop the boats. But the most effective measure to stop desperate people from taking to boats (despite the great risks of piracy, deprivation and death at sea) proved to be facilitating, rather than trying to block, the movement of people by increasing Australia's resettlement quotas and encouraging the rest of the international community to do the same. Fraser's genius was ultimately in showing that it was possible to construct a humanitarian approach that still served the national interest and did not compromise Australia's commitment to international human rights instruments or its international standing. As well as stopping the boats, the approach the government eventually settled on had the additional benefits of contributing to regional stability and improving relations with its nearest neighbours. It was a regional solution. The Fraser government may have sown the seeds of the current Australian model of asylum, as this article suggests, but its approach also provides a bed from which an alternative, more compassionate and perhaps even more successful approach could grow.

## Notes

1. Even those who are more cautious in celebrating Australian governmental responses to refugees in the twentieth century, such as Marion Le (2001) and Klaus Neumann (2004), contend that Fraser deserves a special place in the history books. Nancy Viviani, Jack Smit and Rachel Stevens provide the only real counterpoints to this argument. In her seminal study of Vietnamese migration to Australia, Viviani (1984) documents the initial resistance of the Fraser government to allowing entry to Australia for any more than a token number of refugees. Smit (2010) re-examines the Fraser government's response to 'commercial' refugee voyages and argues that it marked the beginning of the criminalisation of asylum in Australia, while Stevens (*Age* 2012, 15) argues that Fraser's government 'was resistant, ambivalent and at times pragmatic in responding to the Vietnamese refugee crisis' (see also Stephens 2012). Katharine Betts (2001, 35–36) also notes, but does not elaborate on, the Fraser government's reluctant response to the Vietnamese boat refugees, pointing out that the government 'only later made a virtue of necessity'.
2. The Philippines acceded to the Convention on July 22, 1981.
3. There is an extensive body of literature that describes, discusses and analyses the contemporary Australian model of asylum, particularly under Howard. See, for example, Betts (2003), Jupp

(2002), Manne and Corlett (2004), Mares (2002), Marr and Wilkinson (2003), McMaster (2002) and Stats (forthcoming).

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## 3.2 Bob's Not Your Uncle: Refugee and Asylum Policy Under the Hawke and Keating Labor Governments, 1983-1996

History might not forgive, as US Vice-President Walter Mondale warned the international community at the United Nations Conference on Indo-Chinese Refugees in Geneva in 1979, but sometimes it does forget. Sandwiched between Malcolm Fraser's 'exemplary' response to the first 'wave' of asylum seekers fleeing the Communist regime in Vietnam and the Howard Government's notorious response to the fourth wave of Middle Eastern asylum seekers fleeing the Taliban, the way the consecutive Labor Governments of Bob Hawke and Paul Keating dealt with the second and third waves of Cambodian, Vietnamese, Chinese and Sino-Chinese asylum seekers who began arriving on Australian shores in 1989 is often overlooked. This chapter revisits the Hawke-Keating era and considers their role in the construction of the present border protection regime.

### The *VT 838* – the end of the beginning

The *Kiến Giang* was the first of 54 boats carrying 2,059 Indochinese refugees to Australia between 1976 and 1981. It was greeted with surprise and astonishment when it arrived. Lam Tac Tam, one of the refugees aboard the boat, recalls how he and his four companions simply sailed into Darwin harbor and approached a local fisherman who loaned them ten cents with which to call the "immigration people" from a payphone. The immigration authorities were incredulous that the men had managed to travel 3,500km from Vietnam aboard their small, rickety vessel and unsure of how to deal with them. Australia, as noted, had no policy for dealing with refugees arriving in this manner at the time. The men were given temporary visas and allowed to look for work before being granted permanent visas a few weeks later.<sup>1</sup> The last of these boats to arrive, by contrast, sailed into a changed landscape. The arrival of the *VT 838* in Darwin on 5 October 1981 provided the Fraser Government with an opportunity to demonstrate its tough new line. The *Immigration*

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<sup>1</sup> Ron Sutton, 'Anniversary of First Vietnam Boat Marked', *SBS News*, 27 April 2011, <http://www.sbs.com.au/news/article/2011/04/27/anniversary-first-vietnam-boat-marked>; accessed 24 June 2016.



*(Unauthorised Arrivals) Act 1980*, which allowed for the detention of undocumented migrants and introduced penalties for transporting them, and an amendment Act were proclaimed on 30 September 1981 ahead of the anticipated arrival of the *VT 838*, a commercial vessel carrying a group of 146 “well dressed” asylum seekers (ethnic Chinese Vietnamese from Taiwan and Hong Kong) who were declared to be “prohibited immigrants who have sought to gain entry to Australia by a carefully contrived, large scale plan to mislead and put at risk Australia’s migration controls”.<sup>2</sup> Immigration Minister Ian Macphee argued that “the prosecution and eventual deportation of the organisers and crew and the early removal of the fare paying passengers to their countries of last residence [would] be critical in deterring other people from joining similar ventures”.<sup>3</sup> These measures were not designed to protect vulnerable asylum seekers from exploitation by people smugglers operating risky ventures, as governments of today argue of their own policies (indeed, at this time, it was in the interests of boat operators to make the passages as safe and successful as possible; the criminalisation of asylum seeking begun by the Fraser Government would later lead to riskier operations), but rather Australia’s migration controls. They were strongly supported by the Labor Opposition led by Bill Hayden, who saw “a warning in this for us to double our guard against any person or any group of people who attempt to do this in the future. People who want to come to Australia must join the queue and we must make the decision on how many people we can properly settle, how many people from overseas the Australian populace is prepared to accept and to fit within the confines of what is required in Australia.”<sup>4</sup> The *VT 838* group were taken into custody upon arrival and subsequently deported.<sup>5</sup>

The *VT 838* was the last boat of the first wave of onshore asylum seekers; there were no further spontaneous maritime arrivals to Australia until 1989. Viviani notes how these

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<sup>2</sup> Ian Macphee, ‘Unauthorised Arrivals’, *Commonwealth Parliamentary Debates* (henceforth *CPD*), House of Representatives (henceforth *HoR*), 20 October 1981, p. 2193.

<sup>3</sup> *Ibid.*

<sup>4</sup> Mick Young, *CPD*, *HoR*, 20 October 1981, p. 2195.

<sup>5</sup> See Macphee, ‘Unauthorised Arrivals’. The Government eventually declined to prosecute the crew and organisers of the voyage on account of the anticipated costs of such action. See Greg Turnbull, ‘Asians in Refugee Racket Deported’, *Sydney Morning Herald*, 28 December 1981, p. 3.

protective policies and the absence of boats gave the perception that the crisis was over.<sup>6</sup> This was reinforced when Labor, under the leadership of former ACTU president Bob Hawke, came to power in March 1983. Sensitive to waning public sympathies, particularly in the context of high levels of unemployment and economic recession, the new Government immediately cut the refugee intake as well as the overall immigration intake. Australia's immigration intake dropped from 118,030 under Fraser in 1982 to 93,010 in 1983 after Labor's election and to 68,820 in 1984.<sup>7</sup> However, the proportion of family reunion visas increased dramatically – as Hawke explained, “it is inconceivable that we could accept refugees in the late 1970s and refuse their families in the 1980s”<sup>8</sup> – and the Hawke Government continued with the resettlement program established under Fraser, resettling over 100,000 refugees from more than 35 countries during this time,<sup>9</sup> giving practical effect to his professed commitment to multiculturalism.

### **Blainey immigration debate**

However, by 1984, Labor's multicultural policies and the rate of Asian immigration, boosted by the Indochinese resettlement program and as a natural consequence of the family reunion scheme, sparked a national immigration debate led by historian Geoffrey Blainey, who warned of an “Asian takeover of Australia” as a result of the Government's immigration policies.<sup>10</sup> It was fuelled by the Opposition, who pushed for a higher proportion of European

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<sup>6</sup> Nancy Viviani, *The Long Journey: Vietnamese Migration and Settlement in Australia*, Melbourne University Press, Melbourne, 1984, p. 112.

<sup>7</sup> See Marie Kabala, ‘Immigration as Public Policy’, in James Jupp and Marie Kabala (eds), *The Politics of Australian Immigration*, Australian Government Publishing Service, Canberra, 1993, pp. 7-8.

<sup>8</sup> Hawke is quoting Senator Chipp. See Bob Hawke, ‘Immigration’, ministerial statement, *Commonwealth Parliamentary Debates*, House of Representatives, 10 May 1984, p. 2226.

<sup>9</sup> Department of Immigration and Citizenship, Submission to the Joint Select Committee on Australia's Immigration Detention Network, September 2011, Attachment D: ‘An Historical Perspective of Refugees and Asylum Seekers in Australia 1975-2011’, p. 168, <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf>; accessed 13 February 2012.

<sup>10</sup> The Blainey controversy began with an address he made at a Rotary conference in Warnambool, Victoria, on 17 March 1984, during which he argued “Rarely in the history of the modern world has a nation given such preference to a tiny ethnic minority of its population as the Australian Government has done in the past few years, making that minority the favoured majority in its immigration policy.” The address was reported in the local media (*Warnambool Standard*) and *The Age* (19 March 1984). Discussing his remarks a few days later, he spoke of an “Asian takeover of Australia” and argued: “I do not believe that we are powerless. I do believe that we can with good will and good sense control our destiny.” Geoffrey Blainey, ‘The Asianisation of Australia’, *The Age*, 20 March 1984. He later extrapolated on his views and rationale in a book, in which he cautioned, “We

immigrants to maintain Australia's racial balance.<sup>11</sup> The Government maintained the Vietnamese Orderly Departure Program nonetheless. As Bill Hayden, now Foreign Minister, explained, "If we do not have an orderly departure program, with its consequential obligations about family reunion, people will come to Australia in a disorderly fashion. They will come out in an unorganised fashion in boats, as they have done in the past. People will come who are not the sorts of people we would prefer to accept, through the processing system."<sup>12</sup> The Government managed to dampen the debate by announcing it would cut the family reunion intake and boost skilled migration.<sup>13</sup> However, the public concerns and resentments that Blainey had tapped into remained.

They rose to the fore again, ironically enough, in 1988, the year during which Australians commemorated the arrival of the original "boat people" aboard the First Fleet, following the release of the FitzGerald review of Australia's immigration policies.<sup>14</sup> Despite recommending an increase in the overall migration intake and the continuation of Australia's non-discriminatory selection processes, the report was widely interpreted as an attack on multiculturalism as it recommended a more targeted intake that favoured skilled migration over family reunion<sup>15</sup> and suggested that "multiculturalism was an obstacle to national

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should think very carefully about the perils of converting Australia into a giant multicultural laboratory for the assumed benefit of the peoples of the world." Blainey, *All for Australia*, Methuen Haynes, Sydney, 1984.

<sup>11</sup> See, for example, Leader of the Opposition, Andrew Peacock, *CPD*, HoR, 8 May 1984, p. 2027.

<sup>12</sup> Bill Hayden, *CPD*, HoR, 23 August 1984, p. 276.

<sup>13</sup> See Chris Hurford, Minister for Immigration and Ethnic Affairs Minister for Immigration and Ethnic Affairs, '1985/86 Migration Program', media release, MPS 32/85, 3 June 1985.

<sup>14</sup> Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia*, Australian Government Publishing Service, Canberra, 1988.

<sup>15</sup> See, for example, Robert Birrell and Katharine Betts, 'The FitzGerald Report on Immigration Policy: Origins and Implications', *The Australian Quarterly*, vol. 60, no. 3, 1988, pp. 261-74; James Jupp, *White Australia to Woomera: The Story of Australian Immigration*, Cambridge University Press, Melbourne, 2002, pp. 109-10; Peter Shergold, the Foundation Director of the Office of Multicultural Affairs at the time, interviewed for *Making Multicultural Australia*, 1994 and 1995, <http://www.multiculturalaustralia.edu.au/library/media/Audio/id/589.FitzGerald-Immigration-Policy-Review-1988>; accessed 16 November 2016. See also the response of the Minister for Immigration, Local Government and Ethnic Affairs, Senator Robert Ray, 'Government Response to the Report of the CAAIP [Committee to Advise on Australia's Immigration Policies]', 8 December 1988, republished in *Making Multicultural Australia*, [http://www.multiculturalaustralia.edu.au/doc/ray\\_2.pdf](http://www.multiculturalaustralia.edu.au/doc/ray_2.pdf); accessed 7 May 2012. In it, Ray notes but disputes the popular belief that the Committee rejected multiculturalism.

unity”.<sup>16</sup> Opposition leader John Howard seized upon the report and public opinion, which was increasingly antipathetic towards Asian immigration, and argued that the rate of Asian immigration needed to be “slowed down” to preserve social cohesion.<sup>17</sup>

Howard’s views, however, proved controversial, even within his own party, and this internal discord was cannily exploited by Hawke, who moved a motion affirming the Parliament’s “unambiguous and unqualified commitment to the principle that, whatever criteria are applied by Australian Governments in exercising their sovereign right to determine the composition of the immigration intake, race or ethnic origin shall never, explicitly or implicitly, be among them”.<sup>18</sup> Four Liberal members, including the former Immigration Minister, Ian Macphie, and the future Immigration Minister, Philip Ruddock, crossed the floor to support the motion and two others, including former Immigration Minister, Michael MacKellar, abstained from voting. Liberal Deputy leader Andrew Peacock was absent and former leader Malcolm Fraser made it clear he did not approve of Howard’s position.<sup>19</sup> Howard remained unrepentant, insisting, “I don’t think it is wrong, immoral or anything, for a country to say ‘we will decide what the cultural identity and the cultural destiny of this country will be and nobody else’”.<sup>20</sup> His contentious position on immigration was considered to be instrumental in his losing leadership of the party the following year.<sup>21</sup>

Although Hawke rejected calls for cuts to Asian immigration, he, and later his successor Paul Keating, did respond by cutting the overall immigration intake, which between 1988-9 and

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<sup>16</sup> Colin Rubenstein, ‘What’s Wrong With Multiculturalism?’, University of Adelaide, 2 December 1993. Accessible at <http://www.multiculturalaustralia.edu.au/library/media/audio/id/507.What-is-Wrong-with-Multiculturalism>; accessed 15 April 2017.

<sup>17</sup> John Howard, interview on ABC Radio, 1 August 1988, quoted in Peter Van Onselen and Wayne Errington, *John Winston Howard: The Definitive Biography*, Melbourne University Press, Melbourne, 2007, p. 157.

<sup>18</sup> Bob Hawke, *CPD*, HoR, 25 August 1988, p. 400.

<sup>19</sup> See Bob Hawke, opening address at the 1988 Federation of Ethnic Communities Council of Australia (FECCA) Congress, Canberra, 30 November 1988, [http://www.multiculturalaustralia.edu.au/doc/hawke\\_3.pdf](http://www.multiculturalaustralia.edu.au/doc/hawke_3.pdf); accessed 6 May 2012.

<sup>20</sup> John Howard, September 1988, quoted in Richard Ackland, ‘When Talk of Racism is Just Not Cricket’, *Sydney Morning Herald*, 16 December 2005, <http://www.smh.com.au/articles/2005/12/15/1134500961607.html>; accessed 15 April 2017.

<sup>21</sup> See, for example, Jupp, *White Australia to Woomera*, p. 111; Paul Kelly, *The End of Uncertainty: Power, Politics, and Business in Australia*, Allen and Unwin, Sydney, 1994, pp. 427-8; and Andrew Markus, *Race: John Howard and the Remaking of Australia*, Allen and Unwin, Sydney, 2001, pp. 89-90.

1993-4 almost halved before beginning to rise again.<sup>22</sup> The Humanitarian Program remained untouched, however. Indeed, despite the growing resentment of Asian immigration that Blainey and Howard tapped into, the Hawke Government categorically rejected the recommendation of the FitzGerald report to disengage from Indo-Chinese resettlement.<sup>23</sup> At the International Conference on Indo-Chinese Refugees in Geneva in June 1989, Australia endorsed the Comprehensive Plan of Action (CPA), an international agreement brokered by the UNHCR to discourage further movement of people in the first instance; second, to encourage wearied South East Asian nations to continue to temporarily host asylum seekers arriving on their shores until they were resettled or repatriated under an orderly and carefully monitored repatriation program (i.e. to end pushbacks); and to generate a further commitment from Western nations to resettle all those not repatriated. Under the CPA, boat people arriving in the refugee camps across South East Asia after the middle of March 1989 (16 June 1988 for Hong Kong) were no longer to be automatically regarded as refugees but would instead be subject to individual assessments and subject to compulsory repatriation if their claims were not supported. Those who were found to be refugees were to be resettled under the plan in Western nations. By the time it was concluded seven years later in March 1996, Australia had resettled a further 19,000 Indochinese refugees under the CPA.<sup>24</sup>

### **Tiananmen Square massacre**

Hawke's legacy in terms of refugee policy, however, was defined not by his continued commitment to the Indochinese, even in the face of such attacks on Asian immigration, but by his response to another event in June 1989, namely the military crackdown on peaceful pro-democracy protesters in Tiananmen Square. The Prime Minister tearfully recounted at a public memorial how "[t]anks ran backwards and forwards over the bodies of the slain until they were reduced to pulp, after which bulldozers moved in to push the remains into piles,

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<sup>22</sup> Janet Phillips, Michael Klapdor and Joanne Simon-Davies, 'Migration to Australia Since Federation: A Guide to the Statistics', background note, Parliament of Australia, Parliamentary Library, updated 29 October 2010, <http://www.aph.gov.au/binaries/library/pubs/bn/sp/migrationpopulation.pdf>; accessed 20 July 2012.

<sup>23</sup> Robert Ray, 'Government Response to the Report of the CAAIP'.

<sup>24</sup> Department of Immigration and Citizenship, Submission to the Joint Select Committee on Australia's Immigration Detention Network, September 2011, Attachment D: 'An Historical Perspective of Refugees and Asylum Seekers in Australia 1975-2011', p. 169, <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf>; accessed 13 February 2012.

which were incinerated with flamethrowers.”<sup>25</sup> Abandoning his scripted speech, an emotional Hawke pledged that no one who was in Australia at the time of the Tiananmen massacre would be returned to China against their will.<sup>26</sup> While one journalist described this spontaneous pronouncement as one of Hawke’s “legendary *coup de theatres*”,<sup>27</sup> Manne and Corlett suggest that from the point of view of the Department of Immigration, this was “probably the most irresponsible sentence ever uttered by an Australian prime minister”.<sup>28</sup> It created a bureaucratic nightmare for the Department, which was subsequently flooded with visa applications from resident Chinese students (estimated to be around 18,000 in June 1989<sup>29</sup>) and left with the dilemma of what to do with incoming students who had already paid their fees for courses in Australia but were still awaiting visas.<sup>30</sup> This was then, as it is today, a lucrative business for Australia; Chinese citizens applying for a student visa in Australia were required to outlay at least \$6,000, the equivalent to twenty years’ wages for the average worker in China at the time.<sup>31</sup> Of particular concern was the exponential number of potential migrants who might be sponsored under the family reunion stream to come to Australia should the students be granted permanent residence, which left the Government vulnerable to claims that it had lost control of Australia’s borders and that it was giving special treatment to the Chinese at the expense of other migrant groups.<sup>32</sup>

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<sup>25</sup> Bob Hawke, 9 June 1989, quoted in Greg Callaghan, ‘Remembering Tiananmen’, *The Australian Magazine*, 16 May 2009, p. 18; ‘China in Turmoil: Australia’s Hawke Bursts into Tears Over Stories of Killings’, *Los Angeles Times*, 10 June 1989, [http://articles.latimes.com/print/1989-06-10/news/mn-1236\\_1\\_hawke-memorial-service-tears](http://articles.latimes.com/print/1989-06-10/news/mn-1236_1_hawke-memorial-service-tears); accessed 8 May 2012.

<sup>26</sup> Wendy Tuohy, ‘Tragic Aftermath of Hawke’s Embrace’, *The Age*, 23 September 1983, p. 6.

<sup>27</sup> *Ibid.*

<sup>28</sup> Robert Manne with David Corlett, ‘Sending Them Home: Refugees and the New Politics of Indifference’, *Quarterly Essay*, vol. 13, 2004, p. 30.

<sup>29</sup> See Mobo Gao and Xi’an Liu, ‘From Student to Citizen: A Survey of Students from the People’s Republic of China (PRC) in Australia’, *International Migration*, vol. 36, no. 1, 1998, p. 31. According to journalist Greg Callaghan, the Department of Immigration received up to 10,000 visas applications from Chinese already resident in Australia in the two weeks after the events in Tiananmen Square. Callaghan, ‘Remembering Tiananmen’, p. 18.

<sup>30</sup> Wendy Tuohy suggests there were a further 15,000 in this category, and according to Gao and Liu an additional 25,000 students entered Australia by the end of 1993. See Tuohy, ‘Tragic Aftermath of Hawke’s Embrace’, p. 6; Gao and Liu, ‘From Student to Citizen’, p. 31.

<sup>31</sup> See Gao and Liu, ‘From Student to Citizen’, p. 30.

<sup>32</sup> See Philip Ruddock, *CPD*, HoR, 3 June 1991, pp. 4580-5; John Bradford, *ibid.*, p. 4588.

It was with regard to these concerns that Hawke's promise to the Chinese was translated as the automatic provision of *temporary* rather than permanent protection. As Immigration Minister Gerry Hand pointed out, "there is a difference between providing protection as required under our international obligations and granting immediate permanent residence to those who gain protection. The Government intends, therefore, to make these two things quite separate."<sup>33</sup> The Government had initially granted a visa extension for Chinese nationals until the end of July 1990 and promised that no action would be taken against Chinese visa overstayers during this period and that their situation would be kept "under close and sympathetic review".<sup>34</sup> It subsequently announced that all Chinese citizens resident in Australia, regardless of their visa status, could apply for, and would be granted, four-year domestic protection temporary entry permits.<sup>35</sup> This was a special visa category created to help reduce the number of asylum claims. Chinese nationals were encouraged to withdraw refugee applications in favour of the temporary residence visa, which included sponsorship rights as incentive to do so.<sup>36</sup> The Government insisted that it still intended to provide permanent residence to those who applied for it and were eligible, provided that the situation in China continued to pose a threat to human rights. However, as Hawke and Hand explained, the "timing of such a grant of permanent residence, [would] depend on the rate at which places [could] be provided in the immigration program at that stage, and in the meantime their temporary residence permits would be extended".<sup>37</sup> This allowed the Government to honour its humanitarian commitment to the Chinese while at the same time regulating their intake in such a way that it did not appear to be compromising the immigration program.

Hawke's sympathetic response to the Chinese students is seemingly at odds with his response to the second wave of 'boat people', made up of predominantly Cambodian asylum

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<sup>33</sup> Gerry Hand, media release, 27 June 1990, republished in the *Australian Year Book of International Law 1990-91*, vol. 13, 1991, pp. 334-5.

<sup>34</sup> Bob Hawke, 'People's Republic of China', *CPD*, HoR, 15 June 1989, p. 3523.

<sup>35</sup> Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control*, Australian Government Publishing Service, Canberra, 1992.

<sup>36</sup> Bob Hawke and Gerry Hand, joint media release, 27 June 1990, published in the *Australian Year Book of International Law 1990-91*, vol. 13, 1991, pp. 341-2.

<sup>37</sup> *Ibid.*

seekers who began arriving later that year. Suzie Lang was among the first group of 26 asylum seekers to arrive in late November 1989. As their boat approached Pender Bay, on the Western Australian coast, its Captain announced, “We have wonderful news... We are in Australia and help is on the way”.<sup>38</sup> Lang and her companions did not experience the nervous trepidation that Hieu Van Le felt as they approached the coast (see previous chapter); as she recalled, “[e]veryone cheered and showed great excitement”.<sup>39</sup> But their reception was decidedly different to that of the Vietnamese who arrived by boat in the 1970s and early 1980s. In contrast to the first Vietnamese boat, which quietly slipped into Australia in 1976, the Pender Bay group made headlines across the nation.<sup>40</sup> Instead of the friendly welcome that Le and his compatriots experienced, these second wave arrivals were taken into custody, where they were to remain until they were deported or granted visas, in many cases remaining in detention for years.<sup>41</sup> As Hawke explained in a television interview, “we have an orderly migration program. We’re not going to allow people just to jump that queue by saying, ‘We’ll jump into a boat. Here we are. Bugger the people who’ve been round the world’.”<sup>42</sup> Hawke was determined not to “let any people, or any group of people, in the world think that because Australia has that proud record, that all they’ve got to do is break the rules, jump the queue, lob here and Bob’s your uncle. Bob is not your uncle on this issue. We’re not going to allow people just to jump that queue.”<sup>43</sup>

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<sup>38</sup> Suzie Lang, ‘My Arrival in Australia’, interview conducted by the Australian Council of Churches delegation, 1 January 1992, quoted in Naomi Parkinson, ‘Greeting the Stranger: Examining the (Un)Familiar in Australia’s Detention History’, BA (Hons) thesis, University of Sydney, 2011, p. 3.

<sup>39</sup> *Ibid.*

<sup>40</sup> See, for example, ‘Aborigines Find “Boat People” in Northern WA’, *The Advertiser*, 30 November 1989, p. 1; ‘Cambodian “Boat People” Under Escort in WA’, *Sydney Morning Herald*, 30 November 1989, p. 2; Edmund Doogue, ‘26 Broome Boat People Claim to Be Cambodians’, *The Age*, 30 November 1989, p. 17; “‘Boat People’ Head for Shore’, *The Sun*, 30 November 1989, p. 36; “‘Boat People’ Riddle’, *The News*, 30 November 1989, p. 14.

<sup>41</sup> The Pender Bay group spent an average of 523 days in immigration detention from the date of lodgment until the date they received the primary decision on their applications for refugee status. Department of Immigration, Local Government and Ethnic Affairs, *Annual Report 1989-90*, AGPS, Canberra, 1990, p. 60.

<sup>42</sup> Bob Hawke, interview with Jana Wendt, *A Current Affair*, 6 June 1990, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=date-eLast;page=0;query=hawke%20a%20current%20affair%20transcript%201990;rec=10;resCount=Default>; accessed 14 May 2012.

<sup>43</sup> *Ibid.*



The Cambodians were detained under the *Migration Legislation Amendment Act 1989*, which introduced administrative detention for “illegal entrants”, that is, people who had either entered the country without a valid visa (unauthorised arrivals) or who remained following the expiration of one (visa overstayers).<sup>44</sup> Initially it targeted the latter, who the Immigration Minister Robert Ray accused of “impos[ing] themselves on Australia’s generosity”,<sup>45</sup> but it was subsequently employed against the second wave of mostly Cambodian asylum seekers who began arriving from the end of 1989. The legislation established mandatory deportation for illegal entrants after a four-week grace period and removed most ministerial discretion. As Ray explained, this was meant to “ensure accountable and consistent decision-making... without undue political influence being brought to bear”,<sup>46</sup> or, more bluntly, to cut “political patronage out of immigration, cutting any sleazy aspect out of it”.<sup>47</sup> Under the Act, the costs of detention and deportation became a debt of the detainee to the Australian Government.

The Vietnamese boat people who had arrived during the Fraser era had not been regarded as illegal immigrants.<sup>48</sup> They were subject only to initial health and security checks before being given temporary permits to enter Australia legally<sup>49</sup> and were accommodated, rather than detained, in migrant reception centres or hostels.<sup>50</sup> Their refugee claims were not contested (they were, after all, fleeing persecution by a regime Australia had waged war against) and processed immediately for permanent resettlement.<sup>51</sup> This begs the question: why were the second wave arrivals treated so differently to the previous cohort of boat arrivals? And, given

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<sup>44</sup> *Migration Legislation Amendment Act 1989*, date of assent 19 June 1989.

<sup>45</sup> Robert Ray, ‘Minister Ray Hails Start of New Era in Immigration’, media release, 18 December 1989, [http://www.multiculturalaustralia.edu.au/doc/ray\\_1.pdf](http://www.multiculturalaustralia.edu.au/doc/ray_1.pdf); accessed 15 April 2017.

<sup>46</sup> Robert Ray, quoted by Gerry Hand, ‘Answers to Questions – Illegal Immigrants’, *CPD*, HoR, 19 December 1991, p. 3913.

<sup>47</sup> Robert Ray interviewed on ABC radio, 3 May 1989, quoted in Kerry Carrington, ‘Ministerial Discretion in Migration Matters’, Brief prepared for Senate Select Committee on Ministerial Discretion in Migration Matters, Information and Research Services, Department of Parliamentary Library, September 2003, p. 7.

<sup>48</sup> See Margaret Guilfoyle (on behalf of the Minister for Immigration and Ethnic Affairs Michael MacKellar), ‘Answers to Questions – Vietnamese Refugees’, *CPD*, Senate, 23 November 1979, p. 2958.

<sup>49</sup> *Ibid.*

<sup>50</sup> Amy Nethery, ‘Immigration Detention in Australia’, PhD Diss., Deakin University, 2010, p. 23.

<sup>51</sup> Adrienne Millbank, ‘The Detention of Boat People’, *Parliament of Australia Current Issues Brief*, no. 8, 2000-01, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/CIB/cib0001/01CIB08?print=1](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0001/01CIB08?print=1); accessed 27 May 2012.

Hawke's strong commitment to non-prejudicial treatment of migrants (including refugees), why was his approach towards these boat arrivals so tough when he had been so sympathetic towards the Chinese students?

Of course, this hard-line approach to boat arrivals did not represent a shift of position on the part of Hawke, who, as noted in the previous chapter, had been antipathetic to the boat arrivals in the 1970s. Echoing his sentiments about the Vietnamese asylum seekers in the 1970s, he questioned the legitimacy of the refugee claims of the Cambodians, declaring,

These people are not political refugees. ... there is not a regime, now, in Cambodia which is exercising terror, political terror, upon its population. There is obviously a combination of economic refugeeism, if you like – people saying they don't like a particular regime or they don't like their economic circumstances, therefore they're going to pull up stumps, get in a boat and lob in Australia. Well, that's not on.<sup>52</sup>

Nor did it represent a change of heart for the ALP; the much-vaunted “principled bipartisanship” on the issue of refugees during Fraser's era did not relate to the admission of boat arrivals as such but rather described the ALP's grudging support for Fraser's resettlement policies and its efforts to stop the flow of boats. But it did represent a significant shift towards a more punitive approach to asylum seekers, and one that would have significant and lasting ramifications for Australia's treatment of refugees. McMaster characterises the response to the Cambodians as “a sustained political response of unprecedented hostility”.<sup>53</sup> Manne and Corlett regard this as the beginning of “the road to Nauru”.<sup>54</sup> Similarly, legal expert, Mary Crock argues that the Labor Government's response to the second wave of boat people “set the course for the policies and institutional hostilities that continue to this day”.<sup>55</sup>

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<sup>52</sup> Hawke, interview with Jana Wendt, *A Current Affair*.

<sup>53</sup> Don McMaster, *Asylum Seekers: Australia's Response to Refugees*, Melbourne University Press, 2002, p. 89.

<sup>54</sup> Manne with Corlett, ‘Sending Them Home’, p. 2. See also Robert Manne, ‘The Road to Tampa’, in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *The Legacies of White Australia: Race, Culture and Nation*, University of Western Australia Press, Perth, 2003, p. 165-74.

<sup>55</sup> Mary Crock, ‘Refugees in Australia: Of Lore, Legends and the Judicial Process’, keynote presentation at the *Annual Colloquium of the Australian Judicial Conference*, Darwin, 31 May 2003. Available at <http://jca.asn.au/wp-content/uploads/2013/11/Crock.pdf>; accessed 15 April 2017.

This shift, however, was not simply a matter of “leadership” as many have suggested.<sup>56</sup> (Indeed, I argued in the previous chapter that Fraser’s policies were not, in fact, driven by brave leadership so much as political necessity.) Rather, the shift to a more punitive approach was very much the product of changed circumstances. First of all, the sense of moral obligation and the ideological dividend that had, at least in part, both motivated and justified the Fraser Government’s more sympathetic response to the Indochinese boat people fleeing Communist regimes had, by 1989, dissolved with the Cold War and been replaced by “compassion fatigue” and a pervasive feeling that Australia had done its fair share – and more – for the Indochinese. Second, (just as it had been for Fraser) it was crucial that the Government retain the perception of control over Australia’s borders, particularly in the context of the debate about multiculturalism and the deep vein of disquiet about Asian immigration that Howard had exposed, and, of course, after the fiasco created by Hawke’s promise to the Chinese students. There was also growing concern about the number of people who had overstayed their visa, estimated to be around 71,000 in April 1989,<sup>57</sup> whose presence, particularly in the context of rising unemployment, threatened to undermine the Government’s veneer of control.<sup>58</sup> Whereas Hawke’s impulsive and unilateral policy-making with respects to the Chinese was seen as the actions of a Prime Minister both “out of control”<sup>59</sup> and losing control of the carefully managed migration program, these new boat arrivals provided an opportunity to show that the Government could, and would, exercise control over the nation’s borders.

Detention thus played a symbolic role domestically, as a public demonstration of strong leadership and of the Government’s control over its borders. Internationally, it was intended to serve an important deterrent purpose to would-be asylum seekers, particularly the Chinese

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<sup>56</sup> See, for example, Margot O’Neill, *Blind Conscience*, UNSW Press, Sydney, 2008, p. 20; Malcolm Fraser and Margaret Simons, *Malcolm Fraser: The Political Memoirs*, Melbourne University Press, Melbourne, 2010, p. 419.

<sup>57</sup> Based on an overstay of three months or more. See Robert Ray, Estimates Committee E, Department of Immigration, Local Government and Ethnic Affairs, Program 1 – Migration and Visitor Entry, Subprogram 1.5 – Compliance, 11 April 1989, p. 29.

<sup>58</sup> See Glenn Nicholls, ‘Gone with Hardly a Race: Deportees in Immigration Policy’, in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand*, ANU E-Press, Canberra, 2009, p. 15.

<sup>59</sup> See Tuohy, ‘Tragic Aftermath of Hawke’s Embrace’.

in the wake of Tiananmen.<sup>60</sup> While the Government was prepared to look after Chinese nationals in Australia, detention was intended to discourage Chinese outside of Australia from harbouring hopes that the benevolence shown to their compatriots might also be extended to them should they make it to Australia. With respects to the Cambodians it also had an important political function. Whereas the Australian Government had intended to send a strong message to the Chinese Government by offering refuge to Chinese nationals in Australia, it could not risk sending such a message in the case of the Cambodians because of Australia's important role in brokering the Cambodian Peace Plan, sometimes known as the Evans Peace Plan in acknowledgement of the key role of the Australian Foreign Minister, Gareth Evans.<sup>61</sup> Since the plan involved the repatriation of Cambodians from Thailand, who were no longer considered to be refugees, the admission of any of the Cambodian boat people to Australia on humanitarian grounds would have undermined the claim that this diplomatic strategy had been successful and conditions in Cambodia were no longer producing refugees and were thus safe for repatriation.<sup>62</sup> Evans and the Government therefore adopted the line that the Cambodian boat people were illegal migrants engaged in "economic refugeeism".<sup>63</sup>

Until 1991, asylum seekers had been held in low security immigration detention centres in Melbourne (Maribyrnong), Sydney (Westbridge Migrant Centre/Villawood) and Perth. However, the capacity of these facilities was limited (70 at Maribyrnong, 272 at Villawood and 42 at Perth<sup>64</sup>) and unable to deal with the new influx.<sup>65</sup> The first centre commissioned

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<sup>60</sup> Gerry Hand, Cabinet Submission 217 – Custody of Boat People – Decision 326, 29 April 1992, National Archives of Australia, A14217, 217.

<sup>61</sup> See Gareth Evans, 'Outline of the Cambodian Peace Plan', *CPD*, Senate, 24 November 1989, [http://www.gevans.org/speeches/old/1989/241189\\_fm\\_outlinecambodia.pdf](http://www.gevans.org/speeches/old/1989/241189_fm_outlinecambodia.pdf); accessed 14 May 2012.

<sup>62</sup> See Paul Kelly, *The March of the Patriots: The Struggle for Modern Australia*, Melbourne University Press, Melbourne, 2010, p. 190; Manne with Corlett, 'Sending Them Home', p. 3; O'Neill, *Blind Conscience*, p. 21.

<sup>63</sup> Hawke, interview with Jana Wendt, *A Current Affair*; see also John Masanaukas, 'Government Has Only Itself to Blame', *The Age*, 17 April 1992, p. 4.

<sup>64</sup> Human Rights and Equal Opportunity Commission (HREOC), 'Preliminary Report on the Detention of Boat People', HREOC, Sydney, November 1997, [http://www.humanrights.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.humanrights.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf); accessed 18 November 2016.

<sup>65</sup> Department of Immigration and Citizenship, Submission to the Joint Select Committee on Australia's Immigration Detention Network, September 2011, p. 197, <http://www.immi.gov.au/media/publications/pdf/2011/diac-jscaidn-submission-sept11.pdf>; accessed 13 February 2012.

specifically for the detention of unauthorised arrivals was established in 1991 in Port Hedland in Western Australia, some 1,600km north of Perth, with the capacity to accommodate up to 700 detainees. The official justification for establishing the new facility in such a remote and isolated location was its relative proximity to Australia's northern border, where most of the boats were arriving, and the existence of an international airport, which would facilitate the deportations of failed asylum seekers. Brennan, however, argues that the remote location was chosen in order to keep the Cambodian boat people at a distance from lawyers and the media "so that their public description as economic migrants would stick without causing any haemorrhaging of the Evans peace plan".<sup>66</sup> In any case, the establishment of the Port Hedland Immigration Reception and Processing Centre marked an important change in the treatment of, and attitudes towards, asylum seekers in Australia. Whether it was intentional or incidental, the location of this purpose-built facility effectively insulated the boat arrivals from legal support and the scrutiny of the media, thus also effectively containing public sympathy. MacCullum observed the change in public perceptions that occurred as a result; whereas "[p]reviously the boat people had been treated as guests, albeit uninvited ones who did not yet enjoy all the privileges of residents", "[n]ow they were isolated and locked up. Clearly they must be guilty of something to be treated so like criminals."<sup>67</sup> Detention thus also played a punitive role that helped to legitimate the Government's tough approach towards the Cambodians.

### **Mandatory detention, the policy we had to have**

In December 1991, Paul Keating took over the ALP leadership, becoming the 24<sup>th</sup> Prime Minister of Australia. One of the first significant changes to take place under his leadership was the separation of the Migration and Humanitarian Programs, as recommended by the National Population Council in its 1992 report, *Refugee Review*.<sup>68</sup> The move was announced by Immigration Minister Gerry Hand in January 1993, along with an increase of 2,000 places

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<sup>66</sup> Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, University of Queensland Press, Brisbane, 2003, p. 34.

<sup>67</sup> Mungo MacCullum, 'Girt by Sea: Australia, the Refugees and the Politics of Fear', *Quarterly Essay*, no. 5, 2002, p. 23.

<sup>68</sup> National Population Council, *Refugee Review*, AGPS, Canberra, July 1991, pp. 14, 41.

(from 10,000 to 12,000) in the humanitarian intake for 1992-3.<sup>69</sup> The Refugee Review Tribunal was established in mid-1993, replacing the Refugee Status Review Committee, which, according to its critics, had been unwieldy, unfair and subject to political influence.<sup>70</sup> In October that year, the Government introduced a special assistance visa category (SAC) for Cambodians who “were experiencing hardship as a result of upheavals in Cambodia” and could demonstrate close links to Australia, which included those who had come to Australia by boat between 28 November 1989 and 26 April 1991 and spent “the greater part of their stay in Australia” in immigration detention.<sup>71</sup> It was pitched as a “compassionate response” to the plight of these people who had spent up to four years in detention.<sup>72</sup> In November, the temporary residence visas for the Chinese students were abandoned and those holding them were given permanent residence.<sup>73</sup> In total, 33,617 Chinese nationals became permanent residents this way.<sup>74</sup>

These moves did not, however, represent a softening of attitude towards asylum seekers in general as some commentators suggested.<sup>75</sup> The SAC was little more than a means of encouraging the Cambodian asylum seekers to leave Australia and ensuring they could return only under conditions of the Government’s determining. In order to apply under the SAC, they were required to voluntarily return to Cambodia and wait for at least twelve months before applying.<sup>76</sup> Although it was touted as a humanitarian initiative, applicants were

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<sup>69</sup> Gerry Hand, ‘Immigration Minister Announces Annual Refugee, Humanitarian and Special Assistance Category Migrants for 1992/93’, media release, MPS 41/92, 24 July 1992.

<sup>70</sup> Anthony Reilly, ‘A Brighter Horizon for Refugees’, *Alternative Law Journal*, vol. 19, no. 1, 1994, p. 42.

<sup>71</sup> Nick Bolkus, Minister for Immigration and Ethnic Affairs, ‘Special Assistance Category for Cambodians’, media release, B36/93, 19 October 1993.

<sup>72</sup> Nick Bolkus, *CPD*, HoR, 19 October 1993, p. 2084.

<sup>73</sup> Nick Bolkus, ‘Government Decision on PRC Nationals’, media release, 1 November 1993.

<sup>74</sup> DIMIA, Statistics Section, ‘Australian Immigration Consolidated Statistics’, no. 21, 1999-00, June 2002, p. 24; Graeme Hugo, ‘From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia’, *GeoJournal*, vol. 55, 2001, p. 30.

<sup>75</sup> See, for example, Reilly, ‘A Brighter Horizon for Refugees’, p. 42.

<sup>76</sup> Class 214 Cambodian (Special Assistance) Visa and Entry Permit, Division 1.3, Permanent Resident Refugee and Humanitarian Offshore Program, Migration Regulations 1994 (Cth) <http://www.comlaw.gov.au/Details/C2004L05246>; accessed 25 May 2012. This SAC category was phased out under the Howard Government. The Cambodian SAC was terminated in September 1996, along with the East Timorese SAC and the Soviet Union SAC. See Philip Ruddock, ‘Minister Announces Further Details of 1996-7 Humanitarian Program’, media release, MPS 59/96, Canberra, 4 September 1996,

required to find a domestic sponsor and to fund their own travel back to Australia. This effectively transformed the unwanted claims of asylum into controlled migration outcomes.<sup>77</sup> The granting of permanent residence to the Chinese was merely the final step in quietly cleaning up the “mess” that Hawke had created. It was justified as being in the national interest rather than as a humanitarian gesture. As then-Immigration Minister Nick Bolkus later explained, “In coming to our decision, we comprehensively went through the profile of the students, and discovered that *we had within our shores some of the crème of young China* and in November 1993 we essentially allowed all the students from China plus 6,000 or 7,000 from other parts of the world to stay in Australia, to access our migration system.”<sup>78</sup>

In fact, Hawke’s deterrence policies hardened under Keating. Although the Cambodians had ceased to arrive after April 1991, a slow but steady stream of boats continued, carrying predominantly Vietnamese and Chinese asylum seekers.<sup>79</sup> Additionally, the Government faced a Federal Court challenge from a group of Cambodian asylum seekers seeking release from detention while their claims were pending.<sup>80</sup> The introduction of mandatory (in place of what was until this time discretionary) detention for unauthorised boat arrivals via the *Migration Amendment Act 1992*<sup>81</sup> with “the very strong support of the Opposition”<sup>82</sup> was thus

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<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1996/r96059.html>; accessed 14 July 2012. The Vietnamese SAC was terminated in June 1997. See Philip Ruddock, ‘Minister Announces Details of 1997-98 Humanitarian Program’, media release, MPS 60/97, 24 June 1997, <http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1997/r97060.html>; accessed 14 July 2012.

<sup>77</sup> Between October 1993 and January 1996, when Nick Bolkus announced the program’s continuation, 1,361 visas were granted under the Cambodian SAC. See Nick Bolkus, ‘Cambodian Special Assistance Category to Continue’, media release, B6/96, 18 January 1996.

<sup>78</sup> Nick Bolkus, quoted in Emily Bourke, ‘Post-Tiananmen Migrants Leave Lasting Legacy’, *ABC PM*, 4 June 2009, <http://www.abc.net.au/pm/content/2008/s2589754.htm>; accessed 8 May 2012. Emphasis added.

<sup>79</sup> They consisted of six boats carrying 214 asylum seekers in 1991 and another six in 1992 carrying 216. See DIMIA, Fact Sheet 74a - Boat Arrival Details (on Australian Mainland), 6 October 2004, [http://sievx.com/articles/psdp/DIMIA74a\\_boatarrivals.pdf](http://sievx.com/articles/psdp/DIMIA74a_boatarrivals.pdf); accessed 10 May 2012.

<sup>80</sup> The group of Cambodian asylum seekers had arrived by boat in 1989 and 1990 and were denied refugee status in April 1992. They subsequently initiated a Federal Court action to challenge the outcomes of their claims and the legality of their detention, requesting release into the community until their claims were finalised. See Penelope Mathew, ‘Sovereignty and the Right to Seek Asylum: The Case of Cambodian Asylum-Seekers in Australia’, *Australian Year Book of International Law*, vol. 15, no. 37, 1994, p. 37. See also Mary Crock, ‘A Legal Perspective on the Evolution of Mandatory Detention’, in Mary Crock (ed.), *Protection or Punishment: The Detention of Asylum Seekers in Australia*, The Federation Press, Sydney, 1993, pp. 33-4.

<sup>81</sup> *Migration Amendment Act 1992*, assent date 6 May 1992, <http://www.comlaw.gov.au/Details/C2004A04315>; accessed 20 May 2001.

intended to send a clear message, not only to would-be asylum seekers but also the judiciary, that access to Australia could be gained neither by boat nor court.<sup>83</sup> On 5 May 1992, two days before the Federal Court was due to hear the Cambodian case, the Government pushed the legislation, designed to prevent judicial review of detention, through Parliament, and it was enacted the following day. It stipulated that “designated persons” be detained until they were granted an entry permit or departed Australia and that “courts shall not order the release of designated persons”.<sup>84</sup> A designated person was a non-citizen who had arrived by boat between 19 November 1989 and 1 December 1992 without an entry permit or visa (i.e. encompassing the Cambodians and all other boat arrivals during this period).<sup>85</sup> The retrospective nature of the amendments meant that those who were in the community without refugee status were also rounded up and placed in custody.<sup>86</sup> Detention was initially limited to a maximum of 273 days; however, this limit was later removed when the Act was implemented in September 1994,<sup>87</sup> creating the possibility for indefinite detention.<sup>88</sup> The *Migration Reform Act 1992* extended mandatory detention to apply to all unlawful non-citizens, rather than only unauthorised maritime arrivals. Those who “an officer knows or reasonably suspects [is] ... in the migration zone ... and is an unlawful non-citizen”<sup>89</sup> could only be released with the grant of a visa or in order to leave Australia. This measure was somewhat softened by the introduction of bridging visas for visa overstayers.<sup>90</sup>

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<sup>82</sup> See Philip Ruddock, *CPD*, HoR, 5 May 1992, p. 2373.

<sup>83</sup> See, for example, second reading speeches on Migration Amendment Bill 1992, *CPD*, HoR, 5 May 1992, especially Immigration Minister Gerry Hand (p. 2372) and Michael MacKellar (p. 2383).

<sup>84</sup> See section 54R of the *Migration Amendment Act 1992*, <http://www.comlaw.gov.au/Details/C2004A04315>; accessed 20 May 2012. This was later ruled invalid by the High Court. Mathew, ‘Sovereignty and the Right to Seek Asylum’, p. 38.

<sup>85</sup> See section 3 of *Migration Amendment Act 1992* and section 54K of the *Migration Act 1958*.

<sup>86</sup> MacCullum, ‘Girt by Sea’, p. 23.

<sup>87</sup> The *Migration Reform Act 1992* was meant to have entered into force in 1993 but proved controversial and its implementation was thus delayed until 1 September 1994. See Mathew, ‘Sovereignty and the Right to Seek Asylum’, p. 37 (footnote 5).

<sup>88</sup> The limits on detention were removed in 1994, when the *Migration Reform Act 1992* was implemented.

<sup>89</sup> *Migration Act 1958*, s. 189.

<sup>90</sup> Migration Regulations (Amendment) SR No. 280 of 1994.



These amendments were subsequently challenged in the High Court, which ruled that the detention of the Cambodians prior to the passage of the legislation was unlawful.<sup>91</sup> The Government quickly implemented legislation to restrict damages to unlawfully detained asylum seekers to \$1 per day.<sup>92</sup> The High Court ruling otherwise confirmed the validity of the legislation. Counsel for the Cambodians had argued that only the judiciary could deprive someone of their liberty; however, the High Court decided that, while this was the case for citizens, the Federal Parliament had the power to deal with non-citizens, including detaining them for administrative (but not punitive) purposes. Even though it was applied discriminately (it did not initially apply to visa overstayers, who were able to apply for bridging visas and stay in the community while their claims were processed), mandatory detention was regarded as administrative because, it was argued, unlike those incarcerated for punitive purposes, asylum seekers were able to end their incarceration by voluntarily leaving Australia (though this ignored the fact that those seeking asylum claimed to have fled life-threatening persecution in their countries of origin and, as asylum seekers, were unlikely to find entry to any other third countries).<sup>93</sup> According to then-Shadow Immigration Minister Philip Ruddock, the Court's decision affirmed the principle that "it is the right of the Government of the day to determine who shall and who shall not enter Australia".<sup>94</sup>

When it was first introduced in 1992, mandatory detention was intended as an "interim measure" only to address "the pressing requirements of the current situation" and a "specific class of persons",<sup>95</sup> namely, the Cambodian boat people. It was retained and expanded, not

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<sup>91</sup> *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. Mary Crock provides a good summary and analysis in 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia', *Sydney Law Review*, vol. 15, no. 3, 1993, pp. 338-56. See also Kristie Dunn and Jessica Howard, 'Reaching Behind Iron Bars: Challenges to the Detention of Asylum Seekers', *The Drawing Board: An Australian Review of Public Affairs*, vol. 4, no. 1, 2003, pp. 45-64; Mary Crock, 'A Legal Perspective on the Evolution of Mandatory Detention', in Mary Crock (ed.), *Protection or Punishment: The Detention of Asylum Seekers in Australia*, The Federation Press, Sydney, 1993, p. 34; Mathew, 'Sovereignty and the Right to Seek Asylum', p. 38.

<sup>92</sup> See section 6, *Migration Amendment Act (No. 4) 1992*, no. 235, 1992, date of assent 24 December 1992, <http://www.comlaw.gov.au/Details/C2004A04526>; accessed 21 May 2012.

<sup>93</sup> *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs*.

<sup>94</sup> Michael Millett, 'High Court Upholds Government's Power to Detain Boat People', *Sydney Morning Herald*, 9 December 1992.

<sup>95</sup> See Immigration Minister Gerry Hand, second reading speech for the Migration Amendment Bill 1992, *CPD*, HoR, 5 May 1992, p. 2370.

because it was a successful deterrent (indeed, it was not – while the number of asylum applications in other developed countries fell after peaking in 1992, onshore asylum applications actually increased in Australia until 2002<sup>96</sup>) but because it was successful in projecting the Government’s domestic message to the Australian public that it was taking a hard line against these unwanted arrivals. In the context of rising concern over immigration, the relaxation or rescinding of this hard line would have left the Government open to charges of going “soft” on border control, which – due to the growing numbers of asylum seekers – was at the top of the political agenda and would remain there for some time. Thus, what began as an interim measure with limited scope was developed into a permanent “solution” with extended scope and was described a decade later by future APL leader Mark Latham as “one of the proud achievements of the Keating administration”.<sup>97</sup>

The mandatory detention legislation may have successfully prevented judicial intervention but it did not deter further boat arrivals, which peaked during Keating’s administration in 1994 with the arrival of 18 boats carrying almost 1,000 asylum seekers.<sup>98</sup> As a result, there was a build-up of people in detention. The Curtin Immigration Reception and Processing Centre, Australia’s “most primitive” detention facility,<sup>99</sup> was opened in 1995 after Port Hedland reached its maximum capacity.<sup>100</sup> Delays in the processing of applications meant

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<sup>96</sup> Tim Hatton and Joe Maloney, ‘Applications for Asylum in the Developed World: Modelling Asylum Claims by Origin and Destination’, Department of Immigration and Border Protection Research Programme Occasional Paper Series, no. 14, April 2015, p. 6, <https://www.border.gov.au/ReportsandPublications/Documents/research/hatton-applications-for-asylum.pdf>; accessed 26 October 2016.

<sup>97</sup> Mark Latham, 20 June 2002, cited in Gerard Henderson, ‘Pragmatism is the Order of the Day’, *Sydney Morning Herald*, 15 March 2005, <http://www.smh.com.au/news/Gerard-Henderson/Pragmatism-is-the-order-of-the-day/2005/03/14/1110649125079.html>; accessed 19 July 2012.

<sup>98</sup> See DIMIA, Fact Sheet 74a – Boat Arrival Details (on Australian Mainland), 2004, [http://sievx.com/articles/psdp/DIMIA74a\\_boatarrivals.pdf](http://sievx.com/articles/psdp/DIMIA74a_boatarrivals.pdf); accessed 10 May 2012. In a report for UNHCR, Alice Edwards found no evidence that detention worked as deterrence for irregular migration or asylum seekers. See Alice Edwards, ‘Back to Basics: The Right to Liberty and Security of Person and “Alternatives to Detention” of Refugees, Asylum Seekers, Stateless Persons and Other Migrants’, *UNHCR Legal and Protection Policy Research Series*, April 2011, pp. III-V. See also International Detention Coalition (IDC), *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, IDC, Melbourne, 2011, p. 1.

<sup>99</sup> Philip Ruddock quoted in Paul Maley and Paige Taylor, ‘PM Reopens Howard’s Toughest Compound’, *The Australian*, 19 April 2010.

<sup>100</sup> Nick Bolkus, ‘Boat People Processing Centre Identified in WA’, media release, B4/95, 25 January 1995, and Bolkus, ‘Boat People Processing Centre to be Activated at Curtin’, B20/95, 28 March 1995.

that many of the asylum seekers remained in detention for years,<sup>101</sup> suffering from the deleterious effects of indefinite incarceration in harsh and isolated environments, uncertainty about the future and the omnipresent threat of deportation.<sup>102</sup> As one detainee described the experience:

When they put us in detention I was shocked. The officers were very tough and they scared us. We didn't know where we were or what they would do to us. We were like sheep – they told us go here, go there, go to your room, shut the door – and they didn't explain anything to us. It was as if we weren't humans, as if we weren't even animals. We were treated like something disgusting ... The days were really dark for me, and the nights were even worse. I visualized rain and storms even when the day was clear. I really felt like I was slowly dying, day after day. I would wake up in the morning to die that day. Go to sleep to die. Wake up in the morning to die. I thought that my life had finished. I had become just like a corpse; no hope, no dreams. Others were trying to kill themselves in there. Days, weeks, and months passed.<sup>103</sup>

Reports of self-harm and suicidal intent and attempts drew damning criticism.<sup>104</sup> Mandatory detention was found to be in contravention of the International Convention on Civil and

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<sup>101</sup> Up to seven years – see DIAC Submission to the Joint Commission on Migration Inquiry in Immigration Detention Sub 129d, September 2008.

<sup>102</sup> As the clinical psychologist Zachary Steel notes, access to detainees is tightly regulated by Immigration officials making independent research difficult. However, those studies that do exist show much higher levels of depression, post-traumatic stress, anxiety, panic and physical symptoms amongst asylum seekers in detention than compatriot asylum seekers who are housed in the community (McGorry *et al.*) and that depressive symptoms increase with the length of detention (Dr Aamer Sultan, himself an asylum seeker who witnessed this, and Kevin O'Sullivan). These studies are cited in Zachary Steel, 'The Politics of Exclusion and Denial: The Mental Health Costs of Australia's Refugee Policy', paper presented at the 38<sup>th</sup> Congress Royal Australian and New Zealand College of Psychiatrists, Hobart, May 2003, available at [www.safecom.org.au/docs/ranzcp-2003-conference-paper.doc](http://www.safecom.org.au/docs/ranzcp-2003-conference-paper.doc). See also results of Steel *et al.* which are reported in this paper.

<sup>103</sup> Equal Rights Trust interview with A.T. (initials changed to protect the identity of the interviewee), ERT-SPD-AU-060, Sydney, 12 July 2009, quoted in *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, The Equal Rights Trust, London, July 2010.

<sup>104</sup> On the effects of detention see, for example, Risé Becker and Derrick Silove, 'The Psychological and Psychosocial Effects of Prolonged Detention', in Mary Crock (ed.), *Protection or Punishment? The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993, pp. 81-90; Ron Kessels and Maritsa Eftimiou, 'Effects of Incarceration', in Mary Crock (ed.), *Protection or Punishment? The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993, pp. 91-5; Patricia Austin, Derrick Silove and Zachary Steel, 'The Impact of Immigration Detention on the Mental Health of Asylum Seekers', in Dean Lusher and Nick Haslam (eds), *Yearning to Breathe Free*, The Federation Press, Sydney, 2007, pp. 100-12. Criticism and concerns led to a Senate inquiry into immigration detention, which reported in February 1994 and affirmed the Government's sovereign right to control its borders and to detain those who entered without permission.

Political Rights (ICCPR) after a Cambodian asylum seeker made a complaint to the UN Human Rights Committee in 1993,<sup>105</sup> though the Australia Government rejected its findings.<sup>106</sup> But despite its dubious value as a deterrent, the documented damaging effects on detainees, and injury to Australia's international reputation, the policy was retained because, as Viviani suggests, it continued to serve an important symbolic role as "a public demonstration that the Department [of Immigration] has Australia's borders 'under control'".<sup>107</sup>

### **"You ain't seen nothin' yet" – the third wave of asylum seekers**

While, as noted, Cambodians ceased to arrive after April 1991, Australia continued to receive a steady stream of Chinese asylum seekers and, after November 1993, new flows of Vietnamese from the Galang refugee camp in Indonesia and Sino-Vietnamese (ethnically Chinese refugees from Vietnam, who had been resettled in China under the CPA) during the Keating years. These arrivals constituted a third 'wave' of asylum seekers, the "last victims", according to Frank Brennan, "of the Comprehensive Plan of Action which proposed the compulsory repatriation back to Vietnam of those left in the camps around Asia".<sup>108</sup> Asylum seeker arrivals to Australia peaked in 1994 (there were 953 arrivals in 1994 alone from a total of 1,688 since 1989) sparking new fears of "invasion" by refugees.<sup>109</sup> The media warned of a "flood" of boat people and, in December 1994, Immigration Minister Nick Bolkus was

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<sup>105</sup> United Nations Human Rights Committee, Communication No. 560/1993 (A v Australia), 30 March 1997, UN doc. CCPR/C/59/D/560/1993, <http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument>; accessed 25 May 2012.

<sup>106</sup> The Howard Government rejected the Committee's findings, issued on 3 April 1997, that the detention of the complainant was in breach of the Covenant, that the provision for review of the lawfulness of his detention was inadequate and that compensation was deserved. See Hilary Charlesworth, 'Human Rights: Australia Versus the UN', Democratic Audit of Australia, discussion paper 22/06, August 2006, [http://apo.org.au/files/Resource/20060809\\_charlesworth\\_aust\\_un.pdf](http://apo.org.au/files/Resource/20060809_charlesworth_aust_un.pdf); accessed 26 March 2017.

<sup>107</sup> Nancy Viviani, *The Indochinese in Australia 1975-1995: From Burnt Boats to Barbecues*, Oxford University Press, Melbourne, 1996, p. 27.

<sup>108</sup> Brennan, *Tampering with Asylum*, p. 48.

<sup>109</sup> See, for example, 'Boat People Flood Feared', *The Age*, 6 January 1995, p. 1; 'Bolkus: We Can't Stop Boat People', *Advertiser*, 29 December 1994; David Jenkins, 'A Tide That Must Be Turned', *Sydney Morning Herald*, 27 November 1993.

quoted as admitting the Government was powerless to stop the flow.<sup>110</sup> The chair of the aforementioned FitzGerald Report and former Australian Ambassador to China, Dr Stephen FitzGerald, supported a tough line on boat arrivals and warned that if Australia took a soft approach, “there could be whole armadas setting out from China”.<sup>111</sup> According to FitzGerald, “[i]t would be a case of, ‘You ain’t seen nothin’ yet’”.<sup>112</sup>

In order to deal with these arrivals, the Government introduced legislative measures in 1994 to preclude protection obligations towards Vietnamese resettled or repatriated under the Comprehensive Plan of Action, those who had been rejected refugee status in another country (i.e. to prevent “forum shopping”),<sup>113</sup> and those coming from a “safe third country” (which included China).<sup>114</sup> These legislative amendments were aimed at stopping unauthorised arrivals from “imposing themselves on Australia’s open society and undermining the integrity of both [its] migration and humanitarian programs”,<sup>115</sup> and served as a corrective to Bolkus’s earlier despairing statement, “we can’t stop the boat people”.<sup>116</sup> As he announced in December 1994, “the doors” were now firmly “closed”:

The message of today’s announcement is a clear one. The objective of today’s announcement is to basically stop boat arrivals coming into Australia, and we expect that the announcement of the measures in the package will have a substantial effect on the number of boats coming here. The fact is that we want to send a very clear message to anyone who is intending to come to Australia illegally by boat with no valid claim that the doors are closed. They are not

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<sup>110</sup> ‘Bolkus: We Can’t Stop Boat People’, *Advertiser*, 29 December 1994; See also Nick Bolkus, speech at the 1995 National Refugee Week Summit, Canberra, 21 June 1995.

<sup>111</sup> Stephen FitzGerald quoted in David Jenkins, ‘A Tide That Must Be Turned’, *Sydney Morning Herald*, 27 November 1993.

<sup>112</sup> *Ibid.*

<sup>113</sup> Nick Bolkus, ‘Processing of Claims by Failed Asylum Seekers’, media release, B44/94, 15 July 1994, and Bolkus, ‘Refugee Decisions for 17 Boat People’, media release, B58/94, 29 August 1994.

<sup>114</sup> *Migration Legislation Amendment Act (No. 4) 1994*, <http://www.comlaw.gov.au/Details/C2004A04809>.

<sup>115</sup> Nick Bolkus, ‘Australia Moves to Stop Boat Arrivals’, media release, 30 December 1994.

<sup>116</sup> ‘Bolkus: We Can’t Stop Boat People’.

wanted here unless they have got a valid claim. Essentially you are not wanted here if you haven't got a valid claim. Don't even bother trying.<sup>117</sup>

The door was firmly bolted, too, against the Chinese fleeing human rights abuses relating to the One Child Policy when the Government responded with legislation to overrule the Federal Court's decision in December 1994 that the threat of forcible sterilisation provided sufficient grounds for a well-founded fear of persecution.<sup>118</sup> Almost all subsequent third wave arrivals were deported with great fanfare.<sup>119</sup>

These measures were successful in containing and controlling the third wave; by December 1995, there were only 30 people left in detention at the Curtin detention centre and Bolkus proudly announced that “[t]he very successful operation to remove Vietnamese refugees to China under the Safe Third Country Legislation means there is now ample accommodation at Port Hedland for all remaining boat people.”<sup>120</sup> Chinese asylum seekers continued to arrive but were promptly deported in a welcome display of the effectiveness of the Government's policies. Two boats that arrived in March 1995 and January 1996 carrying five Afghans and four Iraqis respectively proved to be the exception. All nine were granted permanent protection visas. These were the harbingers of a new cohort of asylum seekers, whose claims upon Australia's hospitality could not be so easily dismissed or legislated away. However, responsibility for this new wave, which would prove to be the most substantial and problematic to date, would fall to a new government, the Coalition Government of John

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<sup>117</sup> Nick Bolkus, 'Boat Arrivals Coming into Australia', doorstep interview, Adelaide, 30 December 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;orderBy=date-eFirst;page=0;query=nick%20bolkus%20Decade%3A%221990s%22%20Year%3A%221994%22;rec=0;resCount=Default>; accessed 23 July 2012.

<sup>118</sup> In response to the Federal Court's ruling in *Minister for Immigration and Ethnic Affairs v. Respondent A and Others* in December 1994, the Migration Legislation Bill (No. 3) 1995 was introduced to the Senate on 31 January 1995 in order to insist that “[t]he fertility control policies of the government of a foreign country are to be disregarded in determining if a non citizen is a member of a particular social group (within the meaning of the Refugee Convention as amended by the Refugee Protocol) for the purpose of considering an application for a protection visa”.

<sup>119</sup> For deportation details of this cohort, see DIMIA, Fact Sheet 74a - Boat Arrival Details (on Australian Mainland), 6 October 2004, [http://sievx.com/articles/psdp/DIMIA74a\\_boatarrivals.pdf](http://sievx.com/articles/psdp/DIMIA74a_boatarrivals.pdf); accessed 10 May 2012.

<sup>120</sup> Nick Bolkus, 'Boat People Processing Centre to be Mothballed', media release, B134/95, 7 December 1995.

Howard, which was elected in March 1996. Its response to the Middle Eastern asylum seekers is explored in the next chapter.

Though their Governments are not eulogised in the way that Fraser's is, history has been reasonably kind to Hawke and Keating. Their role in establishing the punitive system for the reception and treatment of asylum seekers today is often overlooked. As noted in Chapter 3.2 'Welcome to Australia?', the Fraser Government certainly toyed with the idea of temporary protection as a means of protecting Australia from unwanted claims upon its hospitality but it was Hawke who first experimented (ultimately unsuccessfully) with it. It was Hawke who first established detention as the default response to asylum seekers and Keating who formalised this approach for all unauthorised arrivals with the introduction of Australia's unique and contentious mandatory detention regime. This in turn necessitated the establishment of Australia's harsh and remote chain of detention facilities. Despite the key distinction between immigration and refugee policy first acknowledged by the Fraser Government and later formalised by the Keating Government, these measures have all been aimed at avoiding asylum obligations in the first instance and, in the second, imposing a migration framework on the humanitarian program.

The Hawke-Keating era was characterised by the legislature's ongoing battles with the judiciary for control. McMaster argues that these power struggles reflected "a mindset of 'immigration control'" and "indicated a *shift* from refugee protection to immigration control in Australia's refugee determination process".<sup>121</sup> But, as Part II of this thesis demonstrates, Australia's responses to refugees and asylum seekers have, since the very beginning of the nation, been characterised by a migration management approach and an obsession with control. Refugee protection has always played second fiddle to immigration control in Australia. As the previous chapter shows, even the celebrated Fraser era was no exception. The criminalisation of asylum began under Fraser. It was reinforced by the detention regime constructed by the Hawke and Keating Governments to deal with the Indochinese, Sino-Chinese and Chinese asylum seekers of the 1990s. The Howard Government's policies with respects to the Middle Eastern asylum seekers who began arriving in earnest in 1999 built

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<sup>121</sup> McMaster, *Asylum Seekers*, p. 89. Emphasis added.

upon those of his political predecessors. Such policies were then, as they are now, designed to contain the domestic impact of refugee situations rather than to alleviate the suffering of the most needy and vulnerable.



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**PART IV**

**GOT TO KEEP CONTROL: AUSTRALIAN REFUGEE  
AND ASYLUM POLICY AT THE TURN OF THE  
MILLENNIUM, 1996-2013**

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*It's astounding, time is fleeting  
Madness takes its toll  
But listen closely, not for very much longer  
I've got to keep control...  
It's just a jump to the left  
And then a step to the right  
With your hands on your hips  
You bring your knees in tight  
But it's the pelvic thrust that really drives you insane,  
Let's do the Time Warp again!*

Richard O'Brien, 'Time Warp' from the *Rocky Horror Show*, 1973

## 4.1 We Will Decide: Refugee and Asylum Policy during the Howard Era before Tampa

In 1996 Pauline Hanson burst onto the Australian political landscape like a flare, burning fast and furiously and leaving an indelible mark on Australian history before fading into ignominy for the next two decades. After being disendorsed by the Liberal party for comments she made during the election campaign about Aboriginal welfare, Hanson was first elected as an independent in what had been considered a safe Labor seat with a 19% swing, capturing the media spotlight and public attention in the process. In her maiden speech to Parliament, the newly elected member for Oxley outlined her targets: Aboriginal welfare, free trade, and, perhaps most memorably, immigration and multiculturalism. Hanson entered Parliament, in her own words, “not as a polished politician but as a woman who has had her fair share of life’s knocks” whose “view on issues [was] based on commonsense, and [her] experience as a mother of four children, as a sole parent, and as a businesswoman running a fish and chip shop”.<sup>1</sup> She therefore claimed to speak for “ordinary Australians” who, like herself, wanted Australia’s “immigration policy radically reviewed and that of multiculturalism abolished”.<sup>2</sup> She infamously argued that Australia was “in danger of being swamped by Asians” who “have their own culture and religion, form ghettos and do not assimilate”. Objecting to being labelled racist, she reasoned, “if I can invite whom I want into my home, then I should have the right to have a say in who comes into my country”.<sup>3</sup>

It is not coincidental that Hanson was elected the same year that John Howard and the Liberal/National Coalition came to power. Though more simplistic and extreme in their expression, Hanson’s views echoed Howard’s own sentiments; indeed, amongst the voices condemning her divisive views and inflammatory remarks, the Prime Minister’s was notable by its absence. (Howard later defended his silence as a necessary tactic to avoid eliciting more

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<sup>1</sup> Pauline Hanson, maiden speech to Federal Parliament, *Commonwealth Parliamentary Debates*, House of Representatives, 10 September 1996, p. 3860.

<sup>2</sup> *Ibid.*, p. 3862.

<sup>3</sup> *Ibid.*

sympathy and support for her rather than tacit approval of her positions.<sup>4</sup>) When Hanson warned that Australia was “in danger of being swamped by Asians”, she was recalling Howard’s own comments in 1988 when, as Opposition leader, he argued that the rate of Asian immigration to Australia ought to be slowed in order to preserve social cohesion.<sup>5</sup> And in appealing to the sanctity of national sovereignty to deflect charges of racism, Hanson was recycling the line of defence Howard had used; despite being censured by his own party for his comments, Howard had rejected charges of racism and defended his views by arguing, “I don’t think it is wrong, racist, immoral or anything, for a country to say ‘We will decide what the cultural identity and the cultural destiny of this country will be and nobody else’.”<sup>6</sup>

But what had arguably contributed to his loss of the Liberal party leadership in the 1980s may well have helped Howard to win Government in 1996.<sup>7</sup> In 1988, he had complained that he was “being kicked from one end of the nation to the other for being a bigot or racist”, but made it clear that he did not intend to change his views.<sup>8</sup> By the time he regained the leadership of the Liberal party in January 1995, Howard had dropped the anti-Asian immigration rhetoric but maintained the mantra, “we will decide”. In the lead-up to the 1996 election, he campaigned on the issue of border security, arguing that “[th]e responsibility to provide both external and internal security ought to be accepted as a prime responsibility of government – probably the prime responsibility – without comment or debate”.<sup>9</sup> This resonated with the electorate, which, as Hanson suggested, and her election and prominence indicated, was unhappy with both the level and composition of the immigration program.

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<sup>4</sup> John Howard, *Lazarus Rising: A Personal and Political Biography*, HarperCollins, Sydney, 2010, p. 262.

<sup>5</sup> John Howard, leader of the Opposition on PM, ABC radio, 1 August 1988, quoted in Peter Van Onselen and Wayne Errington, *John Winston Howard: The Definitive Biography*, Melbourne University Press, Melbourne, 2007, p. 157.

<sup>6</sup> John Howard, September 1988, quoted in Richard Ackland, ‘When Talk of Racism is Just Not Cricket’, *Sydney Morning Herald*, 16 December 2005, <http://www.smh.com.au/articles/2005/12/15/1134500961607.html>; accessed 6 May 2012.

<sup>7</sup> Paul Kelly, *The End of Uncertainty: Power, Politics, and Business in Australia*, Allen and Unwin, Sydney, 1994, pp. 427-8.

<sup>8</sup> John Howard speaking on John Laws’ radio program, quoted in Van Onselen and Errington, *John Winston Howard*, p. 158.

<sup>9</sup> John Howard, ‘The Role of Government: A Modern Liberal Approach’, Menzies Research Centre Lecture, 6 June 1995, <http://australianpolitics.com/1995/06/06/john-howard-headland-speech-role-of-govt.html>; accessed 20 February 2015.

In the 1998 Queensland state election, One Nation, the party Hanson founded with David Oldfield and David Etteridge, won 22.7% of the vote – outpolling both the Liberal Party and the Nationals – and 11 of 89 seats.<sup>10</sup> Although Hanson lost her own seat,<sup>11</sup> One Nation won 9% of the national vote in the federal election later that year, drawing support away from the Coalition, and claimed one seat in the Senate. It also won three Legislative Council seats in the Western Australian election in early 2001, which saw the Coalition lose government there. However, by the time of the 2001 federal election in November 2001, their support had diminished; a combination of internal discord, unfavourable preference deals and the canny re-appropriation of their support base by the Howard government saw One Nation reduced to a bad aftertaste on the political palate.<sup>12</sup> However, it was a flavor that lingered on in the policies of the Howard government. While Howard claimed his carefully calibrated response to Hanson’s right-wing populism helped to hurry her political demise,<sup>13</sup> Hanson was able to proudly counter-claim that, despite the brevity of her stint in federal politics in the late 1990s, “I did make a difference, the Liberal party under John Howard implemented some of my policies.”<sup>14</sup> This included the turning back of boats at sea following the 2001 *Tampa* incident as described in Chapter 1.2 ‘Drawing a Line’. After the 2001 election, Hanson thus felt justified in claiming that “John Howard sailed home on One Nation policies. In short, if we were not around, John Howard would not have made the decisions he did.”<sup>15</sup>

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<sup>10</sup> The Liberals gave One Nation its second preferences in the 1998 election, a strategy disaster that saw the Coalition Government replaced by Peter Beattie’s Labor Government. That is to say, most of One Nation’s support came at the expense of the Coalition.

<sup>11</sup> Hanson won the primary count with 36% of the vote – 10% more than the next candidate – but lost on preferences. The seat ultimately went to the Liberal candidate, Cameron Thompson.

<sup>12</sup> A Newspoll survey a year after the 1998 election showed that the Coalition had successfully attracted many One Nation supporters (most of whom had been disillusioned Coalition supporters to begin with) back. See Dennis Shanahan, ‘Hasonites Back in the Howard Fold’, *The Australian*, 4 October 1999. In the 2001 federal election, Hanson won 10% of the primary vote in her bid for a QLD Senate seat but lost on preferences after the Liberals placed One Nation last on its preference list.

<sup>13</sup> See Howard, *Lararus Rising*, p. 255-62.

<sup>14</sup> Pauline Hanson, biography, *One Nation*, <http://www.onenation.com.au/paulinehanson>; accessed 30 June 2016.

<sup>15</sup> AAP, ‘It’s Porridge for Pauline’, AAP, 20 August 2003.

But there were other ways in which the Howard government was influenced – or at least mimicked – the policies and rhetoric of Hanson even before the *Tampa* sailed into Australian politics. The following paper, submitted and accepted for publication in *Australian Studies* in 2013, examines policy innovations under the Howard Government leading up to and immediately following the 2001 *Tampa* incident in response to the fourth wave of asylum seekers who arrived in Australia between 1996 and 2001. It explores the way the Coalition sought to assert control over Australia's borders and charts the Howard Government's retreat from both multiculturalism and multilateralism in an era influenced by the rise of Pauline Hanson and One Nation.

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Not applicable.

# We Will Decide: Refugee and Asylum Policy During the Howard Era Before *Tampa*

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This essay critically examines the Howard Government's responses to refugees and asylum seekers during its first and second terms (between 1996 and 2001). In doing so, it challenges common assumptions about the significance of the 2001 *Tampa* affair, which is often regarded as the catalyst for a new and more draconian era in Australia's refugee history. By examining the way the Government reshaped the migration program, retreated from both multiculturalism and multilateralism, and responded to a new wave of asylum seekers in the context of Hansonism, this essay shows that Howard's message to the *Tampa* refugees, 'we will decide who comes to this country and the circumstances in which they come', was consistent with his government's policies from the moment it took office.

**Keywords:** John Howard; Pauline Hanson; refugees; asylum seekers; temporary protection visas

The 2001 *Tampa* incident, when John Howard's Coalition Government turned away an unarmed commercial vessel, that had rescued hundreds of desperate asylum seekers at sea, using military force and retroactive legislation, frequently serves as a starting point for discussions about Australia's contemporary asylum and border control policies.<sup>1</sup> Many commentators regard the incident, which occurred in the lead-up to, and arguably had a significant impact on the result of, the 2001 federal election<sup>2</sup> as a turning point in Australia's refugee history, the catalyst for the increasingly harsh range of border protection measures that have followed. Academics, such as Robert Manne and Graeme Hugo, for example, regard the government's response to the *Tampa* 'a major shift' in Australia's refugee policy that 'transformed Australian domestic politics'.<sup>3</sup> The Senate committee investigating the so-called 'children overboard' incident described it as 'the catalyst for a new so-called 'border protection' regime in Australia',<sup>4</sup> while Howard himself suggested that '[t]he *Tampa* was the beginning of the turning point'.<sup>5</sup> The *Tampa* was, according to journalist Michael Gordon, 'the boat that changed it all'.<sup>6</sup>



It was certainly a significant flash point, coalescing public support and generating a bipartisan consensus for the punitive legislative measures aimed at stemming the flow of unauthorised boat arrivals that became known as the Pacific Solution. However, the *Tampa* incident was neither a turning nor tipping point with respects to Australia's treatment of asylum seekers. As I have demonstrated elsewhere, there has been a consistent trajectory to Australia's responses to refugees and asylum seekers from Federation until the present.<sup>7</sup> However, the focus on this event and the subsequent border protection measures it inspired obscures the fact that the Howard Government's response to the *Tampa* in 2001 was also consistent with its approach to asylum seekers from when it first came to power in 1996. This essay challenges the common perception that the *Tampa* incident represented a turning point for the Howard Government with respects to its treatment of refugees and asylum seekers. It examines policy innovations under Howard leading up to *Tampa* in response to the new wave of asylum seekers who arrived in Australia between 1996 and 2001. These measures included the reshaping of the migration program and cutting of the humanitarian program, the Government's retreat from both multiculturalism and multilateralism, and the introduction of temporary protection visas. It demonstrates that, while the Pacific Solution was opportunistic, Howard's message to the *Tampa* refugees, namely that 'we will decide who comes to this country and the circumstances in which they come',<sup>8</sup> was a theme of his Government from the moment it took office. Towards the end of this article, the consequences of this approach are discussed with reference to the SIEV X tragedy.

The immigration policy that John Howard's Coalition Government inherited when it came to power in March 1996 was deeply unpopular; a Newspoll survey in September 1996 found that 71 per cent of the public felt that the level of immigration was too high,<sup>9</sup> while a 1997 study revealed that the public believed that new migrants, dominated by family reunion rather than skilled entrants, weighed too heavily on the taxpayer-funded welfare system.<sup>10</sup> Philip Ruddock was given the immigration portfolio, somewhat surprisingly given he had crossed the floor to support Labor Prime Minister Bob Hawke's motion affirming Australia's non-discriminatory immigration principles in defiant reproach of Howard back in 1988. Ruddock responded immediately to these public concerns, embarking on a high profile consultative tour of the nation and subsequently announcing a series of cuts and reforms to the immigration program (comprising the migration program and the humanitarian program). The overall immigration intake was cut by 10,000 places, a small but symbolic reduction that acted to reassure the public that the new Government was responsive to their concerns and determined to take control of the fate and future of the nation.

However, these cuts were not only modest but also temporary; immigration more than doubled over the course of the next decade under the Howard Government.<sup>11</sup> The more significant and lasting changes were to the family reunion component of the migration program and the humanitarian program, despite Ruddock's promise that both would 'remain central parts of the immigration program'.<sup>12</sup> Under Labor, family reunion had made up the largest proportion of the migration program, varying between 81 per

cent (in 1984-85) and 55 per cent (1989-90 – 1990-01).<sup>13</sup> Under the Coalition, family reunion was cut by 13,500 places in 1996-97 and was soon exceeded by skilled migration, which was increased to 52 per cent of the migration program in 1997-98 and grew to 68 per cent by 2007-08.<sup>14</sup> The Government also restricted access of new migrants (excluding humanitarian arrivals) to welfare and limited sponsorship under the Preferential Family category to Australian citizens.<sup>15</sup> The humanitarian program was reduced from 13,000 humanitarian places in 1995-96 to 12,000 offshore places per year (minus an additional 2,000 places that had been 'brought forward' to the previous year's intake under the previous government<sup>16</sup>) with the introduction of a 'notional planning intake'<sup>17</sup> of 2,000 places for onshore arrivals.<sup>18</sup> Ruddock also announced that family members of refugees selected for resettlement who did not arrive with the principal applicant would now come under the Humanitarian Program rather than the family stream of the Migration Program. This was pitched as a compassionate change since it meant that family members would be treated as refugees and thus not liable for their airfares to come to Australia nor subject to the fees and other conditions that applied to regular migrants, including the new two-year waiting period before new migrants were eligible to claim social security.<sup>19</sup> However, it effectively further reduced Australia's humanitarian intake. This crafty restructuring of the humanitarian program allowed the Government to appear to be maintaining the overall size of the humanitarian program as promised while obscuring actual cuts of 1,000 offshore places (masked by the nominal quota for onshore arrivals) and to the number of principle applicants by including family reunification in the humanitarian program. The humanitarian intake thereafter remained relatively stable in real figures, hovering between 12-13,000 places per year, though it declined as a proportion of the immigration program over time, halving from 16 per cent under Keating in 1995-96 to just 8 per cent in 2006-07 under Howard.

The Howard Government also retreated from the rhetoric of multiculturalism. In accordance with Howard's election promise, the Office of Multicultural Affairs, created by Hawke in 1987, was effectively closed down and multiculturalism as social policy was 'zeroed' (drained of funding) in the August 1996 budget.<sup>20</sup> Australia's non-discriminatory immigration policy was maintained but the 'm' word itself was studiously avoided. In January 1997, Howard used his first Australia Day address to condemn Labor's championing of multiculturalism, arguing that '[t]he symbols we hold dear as Australians and the beliefs that we have about what it is to be an Australian are not things that can ever be imposed from above by political leaders of any persuasion. They are not things that can be generated by [a] self-appointed cultural elite who seek to tell us what our identity ought to be. Rather they are feelings and attitudes that grow out of the spirit of the people.'<sup>21</sup>

These cuts and changes acted to distinguish the Howard Government from its predecessor and demonstrate that it had taken control of the nation's borders and, as Ruddock described, 'that we, and we alone, are determining the [immigration] agenda'.<sup>22</sup> As a result of these measures and the reassuring rhetoric, public opposition to immigration began to fall away and the (mainly skilled) immigration program soon

began to grow substantially, more than doubling over the course of the next decade under the Howard Government.<sup>23</sup> However, there was one part of the immigration intake that the Government could neither predict nor control, namely, the slow but steady flow of unauthorised maritime arrivals. The arrival of five Afghani asylum seekers in March 1995 heralded the beginning of a new wave of 'boat people', which began in earnest in the second half of 1996, after the election of the Howard Government, and peaked in 1999 with a total of 3,668 boat arrivals that year.<sup>24</sup>

These arrivals threatened to shatter public confidence in the Government's abilities to control Australia's borders. The Howard Government thus devised an innovative means of asserting control (or, at least, the perception of control) over these arrivals, namely, by linking the nominal quota for onshore humanitarian visas to the offshore special humanitarian program (SHP) quota so that the overall size of the humanitarian program could be contained within a set quota.<sup>25</sup> The imposition of a migration framework on the asylum 'problem' in this way was a canny political move that gave the perception that the Government could control the uncontrollable and limit Australia's protection obligations while at the same time appearing to maintain its commitment to Australia's humanitarian program. It was justified as a measure to 'improv[e] program management'<sup>26</sup> but it had the additional consequence of creating two classes of refugees – those who waited patiently in refugee camps for selection and those who arrived without warning or invitation demanding Australia's protection – and placing them in competition with each other. This revived the old concept of a refugee 'queue', first used (and later renounced) by the Fraser Government,<sup>27</sup> and the attendant hierarchy of deservingness. But whereas Fraser had, by his own account, created a queue by increasing resettlement places, Howard constructed a queue by *reducing* resettlement places and pitting refugees against each other in competition for limited places.<sup>28</sup> This generated antipathy towards asylum seekers, who were, as a consequence of the coupling of the quotas, seen as 'taking places' from more deserving humanitarian entrants.

This, in turn, helped to legitimise harsh measures against the 'undeserving' onshore arrivals such as mandatory detention, first introduced by the Hawke/Keating Labor Government and retained by the Howard Government. Ruddock observed that there was 'strong public support for the Government to take a firm hand in this area, to ensure we protect the Australian community' and he pledged to do just that.<sup>29</sup> Other measures included the 45-day rule, which was introduced in July 1997 with a view to discouraging abuse of the onshore protection system, predominantly by visa over-stayers seeking to delay or avoid departure, but this also affected legitimate asylum seekers; those who did not apply for protection within 45 days of their arrival in Australia were denied work rights and access to health care. Similarly, a \$1,000 charge for review by the Refugee Review Tribunal, ostensibly introduced by the Government to 'discourage bogus claims',<sup>30</sup> created an obvious disadvantage for asylum seekers. Operation Cranberry was then set up in August 1997 to detect and deter any 'illegal activity' within Australia's northern waters and further legislative measures designed to limit judicial

review of refugee assessments were introduced to Parliament in September 1997.<sup>31</sup> These measures represented an increasingly security-orientated approach to asylum, that is, protection of a nation under 'attack' and a system open to 'abuse', rather than a human security approach that prioritised the protection of refugees. This securitisation of the state and criminalisation of asylum seekers was reinforced by the continuation of the policy of mandatory detention.

Australia's mandatory detention regime came under fire in 1997, when the UN Human Rights Committee, a body established for the purposes of monitoring compliance with the International Covenant on Civil and Political Rights (ICCPR), of which Australia is a signatory, released its views and recommendations on a complaint submitted by a Cambodian asylum seeker (referred to in the report as 'A'), who had been detained for more than four years at the Port Hedland detention facility without access to legal advice or judicial review. While not a judicial institution, the Human Rights Committee is regarded as 'the pre-eminent interpreter of the ICCPR which is itself legally binding'.<sup>32</sup> Whereas other countries have, as former Committee member Elizabeth Evatt notes, 'released prisoners, paid compensation, amended legislation or introduced new remedies' in accordance with the Committee's recommendations,<sup>33</sup> in the case of *A v Australia*, the Howard Government categorically rejected both the Committee's findings that the detention of A was arbitrary, and therefore in contravention of Article 9 of the ICCPR, and its recommendation that detention must be justified on individual grounds and subject to periodic review.<sup>34</sup>

The Howard Government's response to this case foreshadowed its later responses to UN criticism of Australia's human rights record. In early 2000, for example, the UN Committee on the Elimination of Racial Discrimination (CERD) expressed concern about Australia's treatment of both its indigenous population and asylum seekers arriving on its shores.<sup>35</sup> The Howard Government responded angrily to what it felt was the 'unduly negative' thrust of the Committee's observations. Minister for Foreign Affairs Alexander Downer labelled the Committee's response as 'disappointing in the extreme' and accused it of taking a 'blatantly political and partisan approach' to its examination of Australia's periodic reports.<sup>36</sup> He also accused it of acting outside its mandate with respects to criticism of Australia's asylum policies and promised it a 'bloody nose' for playing domestic politics and embarrassing the Government.<sup>37</sup> Howard was similarly indignant and insisted that Australia should not have to 'dance attendance on the views of committees that are a long way from Australia' and that such matters were best 'resolved by Australians in Australia ... we are mature enough to make these decisions ourselves'.<sup>38</sup> As well as rejecting outright the comments and recommendations of the Committee, the Government retaliated with its own whole-of-government review of the operation of the UN treaty committee system, including CERD, and Australia's engagement with it. The Australian Government was primarily concerned with ensuring 'adequate recognition of the primary role of democratically elected governments and the subordinate role of non-government organisations' and, pointedly, 'that committees and

individual members work within their mandates', as well as enabling 'states to reassert their common understanding of international protection obligations'.<sup>39</sup>

When the review was concluded in August 2000, the Government announced that Australia would 'adopt a more robust and strategic approach to Australia's interaction with the treaty committee system' and 'a more economical and selective approach' to reporting to, and being represented at, treaty committees.<sup>40</sup> It vowed to disallow visits to Australia from treaty committees and provide information only when there was a 'compelling' reason to do so and to reject requests by treaty committees to delay removing unsuccessful asylum seekers seeking recourse at the UN level from Australia. Additionally, the Government announced it would undertake a comprehensive review of Australia's interpretation and implementation of the 1951 Refugee Convention and consider the need for remedial legislation. It further created an interdepartmental committee to push for reform of the UN treaty system.<sup>41</sup> As part of its reform agenda, the Australian Government hosted a series of workshops in Geneva in June 2001 (on 'improving the reporting process') and 2002 ('towards best practice') and July 2003, where it raised its concerns about the UN treaty committee system with representatives from the UN and other countries.

This was an extravagant response to routine and relatively mild criticism that surprised even the UN. As the Head of the UN's Treaty Section Polita Cohona explained, 'It is important to remember that criticism is not levelled for the sole purpose of criticising a country. The criticism is levelled for the purpose of improving in this case the human rights framework that is applicable to all countries in the world, and the ultimate loser would be the international human rights framework if a country were not to take such criticism seriously ... and necessary action taken domestically.'<sup>42</sup> Indeed, the Committee's failure to note Australia's infractions would surely have undermined confidence in its role. The episode revealed the Howard Government's disdain for multilateralism; as Howard defiantly declared, 'in the end, we are not told what to do by anybody'.<sup>43</sup> It demonstrated that Australia did not like to play by the rules it was happy to set for other nations and represented a partial retreat from the system it proudly laid claim to helping to establish.

This sentiment, 'we will decide', was the defining feature of the Howard Government's approach to immigration and asylum, which it was keen to re-assert in the face of international criticism of its mandatory detention regime and in response to the new wave of boat arrivals in the late 1990s. Since Australia's obligations under the 1951 UN Refugee Convention meant that Government could do little but accept the Iraqi and Afghani refugees arriving on its shores as quietly as possible, the Government demonstrated that it alone would '[determine] who shall and shall not enter this country, and on what terms'<sup>44</sup> by making an example of Chinese asylum seekers. The Government thus proudly reported on the deportation of failed Chinese asylum seekers but made no noise about the Middle Eastern refugees arriving in the same manner, to whom it did offer protection.<sup>45</sup> The mass deportation of 69 adults and 23 children from Australia to China the 14 July 1997 as part of Operation Ox, for example, was proffered to the

public as 'further evidence of the Government's determination to deal with the matters properly and effectively'.<sup>46</sup>

Included amongst the Operation Ox deportees was a heavily pregnant woman, Zhu Quing Ping, who had exhausted all avenues of appeal against the rejection of her refugee application but made a desperate plea to remain in Australia for the birth of her child, which, being her second, would contravene China's strict one child policy. Just as she feared, she was forced to undergo a late term abortion upon her return to China, eight and a half months into her pregnancy.<sup>47</sup> When this was made public two years later, drawing trenchant criticism, Ruddock initially denied that his department would authorise such a deportation and, when it became obvious it had, insisted Australia had no obligation towards her, while Howard earnestly reminded critics that 'it must of course be remembered that she originally entered Australia illegally'.<sup>48</sup>

A decade earlier, the Chinese had been the beneficiaries of Australia's first unsuccessful experiment with the temporary protection of refugees after Labor Prime Minister Bob Hawke spontaneously promised protection to the approximately 20,000 Chinese students in Australia at the time of the Tiananmen Square massacre. The Department of Immigration had interpreted this as the provision of temporary protection only in order to avoid compromising the immigration program and to deter further arrivals from China and elsewhere, particularly Cambodia. However, these temporary protection visas were later converted to permanent residence visas under Hawke's successor, Paul Keating. The relatively generous treatment of the Chinese under Hawke/Keating was at that time contrasted to the treatment of the Cambodian boat people, whose detainment and deportation precipitated the mandatory detention regime. Under Howard, the tough line against the Chinese boat people was now contrasted with the apparent benevolence extended to Albanian refugees from Kosovo, who were offered temporary sanctuary in 1999.

Temporary protection for refugees was first advocated as a policy by Pauline Hanson's One Nation party in the lead up to the 1998 federal election. Hanson's policies included zero net immigration (that is, admitting about 30,000 migrants per year to match permanent departures from Australia), which would be continued on a non-discriminatory basis so long as it did not 'significantly alter the ethnic and cultural makeup of the country', and a proposal to provide only temporary protection rather than permanent residency for refugees.<sup>49</sup> She argued that while '[c]ompassion must be extended to genuine refugees ... temporary refuge need not extend to long-term permanent settlement in Australia'.<sup>50</sup> Hanson's justification for temporary protection rested on a strange moral calculus: she argued that since Australia's humanitarian program benefited so few of the world's refugees, it was 'unfair and immoral' to offer permanent protection to any.<sup>51</sup> In the Queensland election in June 1998, One Nation had won nearly 23 per cent of the vote and eleven of 89 seats in the state legislature (all from the Coalition), which meant that it could not simply be ignored.<sup>52</sup> Ruddock thus responded with a campaign to dispel some of the misinformation propagated by One Nation and to address rising concerns about Australia's immigration program amongst

the public.<sup>53</sup> Noting that refugees were 'likely to have been tortured, traumatised, and in need of support for rebuilding a new life', Ruddock labelled the temporary protection proposal 'highly unconscionable in a way that most thinking people would clearly reject'. 'It would mean', he argued, 'that people would never know whether they were able to remain here. There would be uncertainty, particularly in terms of the attention given to learning English, and in addressing the torture and trauma so they are healed from some of the tremendous physical and psychological wounds they have suffered.'<sup>54</sup> Similarly, Health Minister Michael Woolridge labelled the One Nation policy proposal 'deeply flawed and dangerous' and argued the uncertainty and insecurity of temporary protection would 'continue the suffering of refugees who have been tortured and could well complete the insidious work that torture began'. 'Australia', he insisted, 'must and will remain true to its traditions of welcoming people who have fled to this country fearing persecution in their original homeland. We must not and will not turn our backs on those who come here for refuge. To do so would be to betray our moral obligation as a community and to betray that great Australian tradition of helping out those in need.'<sup>55</sup> However, in a matter of just months, the Government had adopted this 'deeply flawed and dangerous' policy as its own, first for the refugees from Kosovo and East Timor and subsequently for all refugees arriving by boat after a large increase in arrivals in 1999.

In 1998, the conflict between the Federal Republic of Yugoslavia (FRY)<sup>56</sup> and the Kosovo Liberation Army (KLA) in Kosovo intensified. Upon coming to power a decade earlier, the Serbian leader Slobodan Milosevic had revoked the autonomous status of the predominantly ethnic Albanian province of Kosovo, dissolving the Kosovo Assembly and closing down Albanian-language broadcast media. These moves were strongly opposed by the predominantly ethnic Albanian population and resisted peacefully at first via a campaign of passive resistance led by Ibrahim Rugova, who was later elected President of the renegade republic. Violence in the province increased after the KLA began attacking Serbian police stations and government offices in 1996. The KLA was regarded as a terrorist organisation by the FRY Government, which increased its military presence in response to the attacks. The intensification of the conflict in 1998, and the displacement of some 250,000 ethnic Albanians as a result, led to the UN Security Council Resolution 1199 on 23 September 1998, which called for an immediate ceasefire and was backed by the threat of 'additional measures' in the absence of compliance. Soon after the Račak massacre on 15 January 1999, NATO decided to intervene ordering air strikes against the FRY. Australia supported the air strikes, which commenced on 24 March and displaced a further 863,000 people from the region.<sup>57</sup> As neighbouring countries struggled to cope with the flow of refugees fleeing Kosovo, the UN High Commissioner for Refugees Sadako Ogata made a desperate appeal to Western nations to provide temporary sanctuary for the refugees in early April.<sup>58</sup> Many governments responded immediately and generously; Germany agreed to take 40,000 refugees, the US 20,000, Turkey 20,000, Norway 6,000, Greece, 5,000, Canada 5,000, while Britain, Denmark, Sweden, Austria and Ireland also agreed to accept refugees.<sup>59</sup> Ruddock, however, announced that while Albanians in Australia would be permitted to

stay on bridging visas,<sup>60</sup> Australia was already doing its fair share via its established resettlement program and could do no more.<sup>61</sup> He suggested Australia was too distant from the crisis to be a practical temporary refuge and, reminding the public of the debacle caused by Hawke's promise to the Chinese after Tiananmen, argued that temporary arrangements in Australia had never been successful.<sup>62</sup> He reported that he intended to meet with representatives of communities affected by the situation in Yugoslavia to stress to them that Australia's multicultural strength depended on 'an overriding and unifying commitment to Australia, its interests and future' and remind them that 'all Australians are required to accept the basic structures and principles of Australian society such as the Constitution and the rule of law, Parliamentary democracy, and tolerance and equality'.<sup>63</sup> Ruddock's comments, which hinted at the potential for refugees to import ethnic conflict and ignite social unrest in Australia, seemed designed to appeal to xenophobic resistance amongst the public to the Muslim Albanians.

Rather than meeting with public approval, however, the Government was widely and heavily criticised for its 'niggardly and over-cautious' response, particularly in light of its strong support of the NATO assault.<sup>64</sup> Quickly realising they had misjudged public sentiment, Howard called a press conference the following evening to announce a change of heart. With Ruddock, who the day before had categorically rejected the idea of offering temporary sanctuary to the Albanian refugees, standing silently by his side, Howard announced that this was precisely what the Government now intended to do. Contrary to Ruddock's justification for Australia's position a day earlier, Howard explained, 'the Government does not believe that in the circumstances it would be appropriate for Australia to rely on geographic distance as an excuse for not doing more' and announced that Australia would take part in the international relief effort by providing temporary protection for 4,000 ethnic Albanians for an initial period of three months and increasing its financial assistance to humanitarian organisations from \$2 million to \$6 million in total.<sup>65</sup> Anxious to avoid accusations of expedient compassion or concessions to external pressures, Howard denied the shift of position was the result of an appeal from the US, insisting it was 'a decision which [was] generated by the Australian Government of its own volition, according to our assessment of what Australia ought to be doing'.<sup>66</sup>

The policy was, as it had been for Hawke with respects to the Chinese students, reactive, conceived on the run and lacking detail. However, Howard, anxious not to repeat the mistakes of the Hawke Government, was very clear on one key point, namely that it was 'a purely temporary measure ... to be seen as separate and apart from the normal immigration and refugee programme' and that Australia's 'main aim must be to see these people returned to their homes, their villages and hamlets in Kosovo as soon as possible'.<sup>67</sup> To this end, legislation was quickly passed through the Parliament creating a new class of visa, known as temporary safe haven visas, with unanimous parliamentary support. The grant of a safe haven visa precluded the possibility of applying for permanent protection or other substantive visas from within Australia so that, as



Ruddock explained, it could not be used as a means of obtaining permanent residence in Australia.<sup>68</sup> The legislation also gave the Minister the power to extend or to cancel the visa once the safe haven was no longer considered necessary and allowed for the detainment and deportation of the refugees without recourse to judicial review once their temporary visas expired.<sup>69</sup>

Though not subject to the mandatory detention regime, the refugees (or, 'temporary safe haven visa holders', as they were pointedly deigned) were initially kept behind barbed wire at Sydney's East Hills army barracks (for their own security, according to official accounts), where they underwent health checks before being transferred to and housed in disused army bases, renamed 'haven centres', in rural locations around Australia. As well as pointing out the insensitivity of housing the traumatised victims of violent conflict in military bases, critics noted that this effectively kept the refugees at a distance from the media and legal personnel who might assist challenging the restrictive nature of the visas they were assigned.<sup>70</sup> It also distanced them from the Australian public and, in particular, from the ethnic Albanian communities in Melbourne and Sydney with whom they might form connections. The Immigration Department had been flooded with calls from Australians offering to host the refugees in their own homes.<sup>71</sup> The South Australian Premier John Olsen offered to provide housing for up to 1000 refugees and the ACT Chief Minister Kate Carnell suggested up to 400 could be placed with local families and in available public housing.<sup>72</sup> The Victorian Premier Jeff Kennett offered to host all 4,000 refugees on account of Victoria's strong Albanian community and suggested that they should be billeted with families, arguing that it would be both demoralising and boring for the already traumatised refugees to be housed at army barracks.<sup>73</sup> Ruddock, however, advised against locals welcoming the refugees into their homes, which he argued would be 'fraught with difficulties', and condemned a reporter from the *Australian* who chaperoned a refugee family from the Singleton army base for putting 'seriously at risk our ability to manage further arrivals of Kosovars'.<sup>74</sup> This physical and psychological distance reinforced the Government's overt intention to ensure their stay was temporary.

The NATO air strikes ended on 11 June after the conclusion of an agreement stipulating the full withdrawal of Serbian/Yugoslav forces, the demilitarisation of the KLA and the deployment of UN security forces and peacekeepers. Despite the lack of infrastructure in their war-damaged homeland, the refugees in Australia were subsequently repatriated against the advice of UNHCR and, as Jupp notes, just 'in time for the winter to descend on their ruined country'.<sup>75</sup> The Australian Government employed incentives to encourage the refugees' voluntary return, including a 'Winter Reconstruction Allowance' for those who agreed to return before the end of October. Yet, it was not oblivious to the dangers facing the returnees; as Foreign Minister Alexander Downer noted, 'Returning Kosovars are in danger of death and injury from landmines, cluster bombs and booby traps. People have died as they work on their farms, collect water or walk through their village. More than half the casualties are young people, with almost one-third of them children less than 4 years of age.'<sup>76</sup> In light

of these hazards, the Australian Government sponsored 'mine awareness training' for the refugees before they were flown home. About 500 of the Kosovo refugees remained after the October deadline for the Winter Reconstruction Allowances, much to Ruddock's displeasure.<sup>77</sup> Ultimately, however, only 82 of the refugees remained Australia permanently.<sup>78</sup> Thus, the Howard Government's first experiment with temporary protection was successful, if controversial.

Just as the Government was closing down the temporary safe haven facilities and farewelling the last of the Kosovar refugees, it was faced with a more serious and growing problem – the peak of a new wave of asylum seekers from the Middle East. Though the public had been supportive of the safe haven refugees and hostile to their forced repatriation, public antipathy towards uninvited asylum seekers had been building as numbers grew during 1999. In the three-year period between 1996-98, there had been just over 1,000 unauthorised maritime arrivals; in 1999 alone, there were 3,668 - more than triple the number of arrivals in just a third of the time.<sup>79</sup> This new cohort comprised predominantly Islamic asylum seekers fleeing Saddam Hussein's regime in Iraq (1,703 people) and the Taliban in Afghanistan (1,104). The arrival of four boats carrying nearly 200 asylum seekers in the space of week in late October, bringing the monthly total to 421 (the greatest number of boat arrivals in a single month to that point), brought the crisis to a head. The 'trickle' had, the media warned, become 'a flood'.<sup>80</sup> It is interesting to note that at this point, unauthorised boat arrivals still did not exceed the number of unauthorised air arrivals (that is, visa over-stayers), yet the latter occasioned no media or public attention at all.<sup>81</sup>

There was new talk of old fears: the media spoke of invasion, a nation under attack from floods of illegal immigrants coming via an 'armada of boats', bringing with them disease and criminality.<sup>82</sup> As journalist Nadya Stani observed, the media rhetoric mirrored that of the Government, which focused on the 'criminally organised' nature of these Middle Eastern arrivals and ignored the forces that were driving them to flee and seek asylum in Australia in the first place.<sup>83</sup> In interviews, Ruddock referred to the Iraqi asylum seekers as people with 'linkages back to Iraq ... who are looking for a migration outcome' rather than refugees or asylum seekers.<sup>84</sup> He questioned whether 'the founders of the Convention envisage[d] that it would become the enabling tool of organised crime'<sup>85</sup> and explicitly linked the people smuggling business with the drug trade in January 2000.<sup>86</sup> Ruddock also problematically conflated asylum seekers with the 55,000 visa over-stayers who had entered legally but were now residing in Australia illegally, giving the impression of a problem of much greater scale.<sup>87</sup> This was a mischievous connection to make since the two groups were not comparable cohorts. Visa over-stayers (at that time, predominantly British [10.1 per cent] and American [8.1 per cent] citizens) had no claims upon Australia's hospitality, were residing in Australia illegally and therefore sought to evade authorities, while the Middle Eastern asylum seekers had a legal right to enter the country for the purposes of claiming asylum and were, for this reason, keen to present themselves to authorities. The conflation of the two distinct populations of non-citizens reinforced the common misperception that the Middle

Eastern asylum seekers were simply illegal immigrants, despite the fact that their refugee claims were almost invariably recognized. In fact, the Government was otherwise largely unconcerned about the visa over-stayers, who, despite their illegality, did not tend to raise the public ire. This determined focus on illegality and criminality drained the issue of sympathy – neither the media nor the public were interested in the stories or forces driving the refugees to flee but merely the manner in which they arrived, which offended Australians' sense of fairness, and the threat they represented to Australia's culture and identity as well as its immigration and humanitarian programs.

After the Iraqis and Afghanis, who were generally found to be legitimate refugees and granted protection visas, the next most significant group of asylum seekers were the Chinese, who, as noted, were being routinely deported. Ruddock thus targeted potential arrivals from China as well as Sri Lanka, Pakistan, Bangladesh and India amongst other countries with an international information campaign launched at the end of October 1999. The campaign employed video, radio, posters and leaflets in multiple languages, including Chinese, Arabic and Bahasa Indonesian, to send 'a clear message that people thinking about undertaking such a trip will fail, will be ruined financially and could even die'.<sup>88</sup> They also advertised the introduction of a series of tougher penalties, including 20-year jail terms and fines of up to \$220,000, for those convicted of people smuggling. At the same time, the Government provided greater powers to Immigration and Customs officers via the *Border Protection Legislation Amendment Act 1999*, allowing them to board and detain suspected asylum seeker boats in international waters, and introduced legislation to permit fingerprinting and palm recognition to help identify asylum seekers and ensure they had not already sought, or been denied, protection elsewhere. Ruddock called upon 'all Australians to let their friends and relatives know that the message is clear: pay a people smuggler and you'll pay the price. People must understand that Australia welcomes migrants – not illegal entrants'.<sup>89</sup> Nor, it was clear, asylum seekers.

The Government could back its strong rhetoric with action in the case of the Chinese and others whose refugee claims were not supported under the Refugee Convention definition and to whom the characterisation as 'illegal entrants' could thus stick. But, this was not the case for the Iraqi and Afghani asylum seekers, whose refugee claims were, almost without exception, supported, despite Ruddock's insistence that they were 'forum shoppers' who were 'trying to exploit Australia's generous arrangements for refugees to gain residence in their country of preference'.<sup>90</sup> The Government could not, therefore, refuse them protection without contravening the *non-refoulement* principle of the Refugee Convention.<sup>91</sup> However, the recent safe haven experience had provided a useful lesson: the Government could meet its obligations and at the same time demonstrate to both the anxious public and to other potential asylum seekers that it was still very much in control by providing protection on a temporary rather than permanent basis. The provision of temporary protection is not explicitly excluded by the Convention, which recognises the right to seek asylum but does not contain a reciprocal obligation on the part of receiving states to *admit* or resettle refugees.

The creation of visa subclass 785 in October 1999 was intended to remove all the enticements (the so-called 'pull factors') drawing the 'queue-jumping', 'forum-shopping' refugees to Australia. These three-year temporary protection visas (TPVs) provided to all unauthorised arrivals found to have a legitimate claim for protection in Australia excluded holders from accessing permanent residence and sponsoring family, prohibited them from leaving and legally returning to Australia, and blocked access to Commonwealth-funded English language training, housing support and employment assistance.<sup>92</sup> Despite believing that it 'would not stop one illegal immigrant from coming to this country',<sup>93</sup> the Labor Opposition supported the TPV policy because it felt it could not counter the Government's rhetoric about 'queue-jumping' refugees and feared that, unless it was seen to be supporting the policy, it would be blamed for all further arrivals. As Con Sciacca, Shadow Minister for Immigration explained, 'I would hate to think that I, as the Shadow Immigration Minister, would be in a position where every time another boat came in that somehow [the Coalition] would be able to say 'Oh, it's the fault of the Labor Party'''.<sup>94</sup> Initially, TPV holders could apply for permanent protection after 30 months provided there was an ongoing need for protection; however, as of 27 September 2001 (that is, post-*Tampa*) all unauthorised arrivals meeting the criteria for refugee status who had, since leaving their home country, resided in another country where they were judged to have had access to effective protection (including Convention non-signatories such as Indonesia) for seven days or more were ruled as ineligible for permanent protection in Australia (the 'seven-day rule'). Those with an ongoing protection need could apply only for an extension of temporary protection. TPVs made it clear that 'there was a right way to come and a wrong way to come' to Australia, sharpening the distinction between 'good' offshore refugees who were rewarded with permanent protection and 'bad' onshore refugees who were punished with permanent uncertainty.<sup>95</sup> As a consequence, it exacerbated tensions within and between ethnic communities competing for limited and linked onshore and offshore places.<sup>96</sup>

Just as Ruddock had warned when he objected to One Nation's proposal, the temporary protection regime disrupted settlement and exacerbated the trauma of refugees. These effects were documented by studies by Mann in Queensland (2001), in Victoria by Mansouri and Bagdas (2002) and Marston (2003), in New South Wales by Pickering, Gard and Richardson (2003), and in South Australia by Foley (2003), all of which found that TPVs had a deleterious effect on the physical and psychosocial health of recipients, constrained their employment prospects and caused social isolation.<sup>97</sup> TPV holders found it difficult to find work as a result of their impermanency and insecurity about their futures, which discouraged prospective employers from hiring them.<sup>98</sup> They thus found themselves, as one described, 'floating between sky and earth. We are in Australia, but we are not part of Australia. ... This legislation is a rope around my neck.'<sup>99</sup> A University of New South Wales study in 2004 found that refugees on TPVs were seven times more likely to develop depression and post-traumatic stress disorder and ten times more likely to experience 'intense and disabling feelings of fear and terror about the future' than those on permanent protection visas.<sup>100</sup> As one refugee explained, 'I feel

like nothing here in this society. My family is away from me, I haven't got a job ... I can't go anywhere.'<sup>101</sup> The feelings of helplessness, hopelessness and worthlessness experienced by many temporary protection visas holders were described by one of the refugees as 'burning in the fire, but still continuing to live'.<sup>102</sup>

Despite the documented detrimental effects of the temporary protection visa regime and criticism from domestic and international refugee and human rights advocates, the Government maintained the policy on the grounds that it removed the incentive for asylum seekers to risk their lives at sea while still providing effective protection for those who continued to do so. However, the policy failed in these stated deterrence aims; rather than declining, the number of asylum seekers arriving by boat increased dramatically. The October 1999 high was dwarfed the following month, with a new record of 1,246 arrivals in November. The monthly average rose from 79.5 arrivals during the two years prior to the introduction of TPV to 435 in the two years after. Instead, on account of the family sponsorship restrictions on TPV holders, it altered the asylum seeker demographic. In 1999, when temporary protection visas were introduced, the proportion of onshore refugee applications from women and children was just over 12 per cent; by 2001, it had risen to 42 per cent.<sup>103</sup>

The tragic consequences of this policy were highlighted by the 2001 SIEV X disaster. When an Indonesian fishing vessel posthumously labelled SIEV (Suspected Illegal Entry Vessel) X sank in international waters *en route* to Australia on 19 October 2001, 353 people perished and just 44 survived. In contrast to boats that arrived prior to the introduction of TPV, which carried predominantly men, the vast majority of those who perished in the tragedy were women (142) and children (146 children), including a baby still attached to its mother by the umbilical cord.<sup>104</sup> As Amal Basry, one of the survivors, put it, 'People bought death in seeking freedom',<sup>105</sup> people who, had it not been for the implementation of the temporary protection regime, might not have otherwise resorted to risking their lives in a leaky boat. This was subsequently acknowledged by the Secretary of Department of Immigration and Citizenship, Andrew Metcalf, who noted during the 2011 Senate Estimates that 'we did see irregular arrivals move largely from comprising single adult men to comprising family groups. One of the views that have been expressed is that that occurred because one of the restrictions on a temporary protection visa was the inability to sponsor family members and, therefore, people brought their families with them.'<sup>106</sup>

Among the dead were the three daughters and sister of an Iraqi woman named Sondos Ismael. Sondos had lost her father and uncle to Saddam Hussein's regime, the former executed, the latter 'disappeared', and was attempting to join her husband, Ahmed Alzalimi, who had sought protection in Australia in 1999. Ahmed had been recognised as a refugee but granted only a temporary protection visa, which precluded the possibility for him to sponsor his family. Sondos had therefore engaged the services of a people smuggler to take them to Australia aboard the SIEV X to be reunited.<sup>107</sup> After the tragedy, she and the other survivors were taken back to Indonesia to be processed and await resettlement. While the Australian Government was reluctant to

allow the survivors to come to Australia, since it would effectively condone 'queue-jumping' and might encourage others, the Immigration Department conceded it would consider Sondos's case if she was found to be a genuine refugee and could prove her connection to her husband.<sup>108</sup> However, she faced a wait of at least three (and ultimately, five) months for her case to be processed. Her devastated husband Ahmed was unable to visit her in the meantime since the conditions of the TPV prevented him from returning to Australia if he were to leave the country. Thus, not only was the provision of temporary protection the reason Sondos and her daughters had been aboard the heavily overcrowded and dangerously unseaworthy SIEV X on that fateful voyage, it also meant that Ahmed was unable to travel to Indonesia to grieve the loss of his family with, and offer comfort to, his distressed wife.<sup>109</sup>

The SIEV X disaster was, as Robert Manne points out, 'the largest Australian-related civilian catastrophe in the history of this country',<sup>110</sup> though it was not widely acknowledged as such because the victims were neither citizens nor guests of Australia but rather part of a constructed 'threat' to the nation and, in any case, because the Australian Government insisted it was not within Australia's sphere of responsibility. The Prime Minister maintained that since the boat had sunk in Indonesian waters, Australia bore no responsibility for the loss of life.<sup>111</sup> However, DFAT intelligence, which was widely distributed amongst high-ranking members of the Government and its agencies, including the Prime Minister, suggested that the boat had sunk in international waters within the Operation Relex surveillance zone.<sup>112</sup> The Prime Minister's own People Smuggling Taskforce (established during the *Tampa* standoff to make good Howard's promise that 'that boat will never land in our waters – never'<sup>113</sup>) noted on 23 October that the vessel had likely sunk in international waters south of Java.<sup>114</sup> Nevertheless, throughout 2001 election campaign, which, thanks to the *Tampa* incident, was dominated by the issue of boat people, Howard strictly adhered to the line that 'the ship sank in Indonesian waters; it wasn't our fault'.<sup>115</sup> The Government's attempt to distance itself from responsibility for the drowned was ironic given its eagerness to stretch its reach in terms of border protection – to within 30 nautical miles of the Indonesian coast.<sup>116</sup>

Ultimately, regardless of the question of the Government's complicity in the sinking of the SIEV X (which, in the absence of any independent inquiry, remains unresolved), the 353 people who drowned were victims of the Government's border policies, policies designed to protect borders rather than people and preserve votes rather than lives. The victims of these policies were not only those who drowned but also those who survived only to find themselves in limbo between states, like Sondos Ismael, to whom the Australian Government felt it had no obligation and was reluctant to make a compassionate exception for, lest its policies be perceived as a failure. Likewise, her husband, Ahmed Alzalimi, who, despite losing the rest of his young family in the tragedy could not be reunited with his grieving wife, and other temporary protection visa holders, vulnerable people deemed to be in need of Australia's protection, who nevertheless found themselves 'floating between sky and earth', in Australia, but not part

of Australia. Zhu Quing Ping and her aborted baby were also victims of a set of policies so hell bent on 'sending a clear message' that there was no room for a brief stay of deportation orders. And so too the safe haven visa holders, welcomed temporarily when it proved politically advantageous and then forced to return to a broken country and a harsh winter. The Chinese deportees, Middle Eastern asylum seekers and Kosovo refugees alike were all victims of the Government's determination to demonstrate that it, and it alone, would 'decide who comes to this country and the circumstances in which they come'.<sup>117</sup>

## NOTES

<sup>1</sup> See, for example, Peter Charlton, 'Tampa: The Triumph of Politics' in David Solomon (ed), *Howard's Race: Winning the Unwinnable Election*, (Sydney: Harper Collins, 2002); Mary Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows', *Pacific Rim Law and Policy Journal*, Vol. 12, No. 1 (2003), pp. 49-96; Timothy Hatton and Audrey Lim, 'Australian Asylum Policy: The Tampa Effect', *Agenda*, Vol. 12, No. 2 (2005), pp.115-130; Kanishka Jayasuriya, 'Howard, Tampa, and the Politics of Reactionary Modernisation', Symposium: The Liberal Conversation, 7 March 2003, *Australian Review of Public Affairs*, <<http://www.australianreview.net/digest/2003/03/jayasuriya.html>>; accessed 23 April 2008; William Maley, 'Receiving Afghanistan's Asylum Seekers: Australia, the Tampa 'Crisis' and Refugee Protection', *Forced Migration Review*, no. 13, June 2002, pp. 19-21; Robert Manne, '26 August – 11 September 2001. From Tampa to 9/11: Seventeen Days that Changed Australia', in Martin Crotty and David Andrew Roberts, *Turning Points in Australian History*, (Sydney: UNSW Press, 2009), pp. 239-54; Peter Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa*, second edition, (Sydney: UNSW Press, 2002); Peter Mares, 'Ten Years After Tampa', *The Monthly*, 1 August 2011, <<http://www.themonthly.com.au/issue/2011/august/1316394350/peter-mares/comment-ten-years-after-tampa>>; accessed 3 February 2012; Penelope Mathew, 'Australian Refugee Protection in the Wake of the Tampa', *American Journal of International Law*, Vol. 96, No. 3 (2002), pp. 661-76.

<sup>2</sup> Robert Manne ('How Tampa Sailed into 2002', *The Age*, 30 December 2002, <<http://www.theage.com.au/articles/2002/12/29/1040511254630.html>>; accessed 29 August 2015) and Hugh Mackay (qtd in Michael Gordon, 'The Boat That Changed it All', *Sydney Morning Herald*, 20 August 2011, <<http://www.smh.com.au/national/the-boat-that-changed-it-all-20110819-1j2o2.html>>; accessed 23 August 2014) amongst others have argued that the Tampa incident was decisive in determining the 2001 election result. Others such as former Labor leader Kim Beazley and Ian McAllistar argue that it was both the Tampa incident and the events of, and response to, the subsequent 9/11 terrorist attacks that decided the election, emphasizing the critical role of the latter (both qtd in Paul Kelly, *March of the Patriots: The Struggle for Modern Australia*, (Melbourne: Melbourne University Press, 2010 [2009]), p. 615). The role of Tampa in the Coalition's victory is, however, disputed by others, including Liberal party strategist Lynton Crosby (Address to the National Press Club, 21 November 2001) and journalist Peter Browne ('Boats and Votes', *Inside Story*, 6 July 2010, <<http://inside.org.au/boats-and-votes/>>; accessed 19 March 2012).

<sup>3</sup> Graeme Hugo, 'From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia', *GeoJournal*, Vol. 55 (2001), p. 34; Manne, 'From Tampa to 9/11'.

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- <sup>4</sup> Select Senate Committee on a Certain Maritime Incident, *Select Senate Committee on a Certain Maritime Incident Report*, Parliament of the Commonwealth of Australia, 23 October 2002, <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/maritimeincident/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index)>; accessed 26 August 2015, p. 1.
- <sup>5</sup> Prime Minister John Howard in the 2011 ABC documentary, *Leaky Boat*, by Victoria Pitt and Penny Chapman, <http://www.abc.net.au/tv/programs/leakyboat.htm>; accessed 4 March 2012.
- <sup>6</sup> Michael Gordon, 'The Boat That Changed it All', *Sydney Morning Herald*, 20 August 2011, <<http://www.smh.com.au/national/the-boat-that-changed-it-all-20110819-1j2o2.html>>; accessed 23 August 2014.
- <sup>7</sup> See Katrina Stats, "Characteristically Generous'? Australian Responses to Refugees Prior to 1951', *Australian Journal of Politics and History*, Vol. 60, No. 2 (2014), pp. 177-93; and Katrina Stats, 'Welcome to Australia? A Reappraisal of the Fraser Government's Approach to Refugees, 1975-83', *Australian Journal of International Affairs*, Vol. 69, No. 1 (2015), pp. 69-87.
- <sup>8</sup> Prime Minister John Howard, Address at the Federal Liberal Party Campaign Launch, 28 October 2001, <<http://web.archive.org/web/20020523100520/http://www.pm.gov.au/news/speeches/2001/speech1311.htm>>, accessed 18 June 2013.
- <sup>9</sup> Newspoll conducted 17-19 September 1996 qtd in John Short, '71% Say Migrant Intake Too High', *The Australian*, 4 October 1996, p. 1.
- <sup>10</sup> Katharine Betts cites a study conducted by Clemenger BBDO in 1997 that found that 70 per cent of respondents were very concerned about new migrants use of welfare and 52 per cent felt that migrants 'take from Australia and give nothing back'. See Katharine Betts, 'Immigration and Public Opinion: Understanding the Shift', *People and Place*, Vol. 10, No. 4 (2002), p. 29.
- <sup>11</sup> Permanent migration grew from 98,538 in 1997-98 to 206,135 in 2007-08. The migration program grew from 67,090 in 1997-98 to 158,630 in 2007-08. See Australian Bureau of Statistics (henceforth ABS), 'Permanent Migration to Australia – An Overview by Eligibility', Cat. No. 3416.0 – Perspectives on Migrants, 2009.
- <sup>12</sup> Philip Ruddock, Minister for Immigration and Multicultural Affairs, 'Minister Begins Consultations on Immigration Program', Media Release, 1 April 1996, MPS 2/96, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1996/r96002.html>>, accessed 14 July 2012.
- <sup>13</sup> See Table 1 in Janet Phillips, Michael Klapdor and Joanne Simon-Davies, 'Migration to Australia Since Federation: A Guide to the Statistics', Background Note, Parliament of Australia, Parliamentary Library, updated 29 October 2010, p. 13.
- <sup>14</sup> See ABS, 'Permanent Migration to Australia – An Overview by Eligibility'.
- <sup>15</sup> Ruddock, 'Migration Program Revamped to Benefit Australia', Media Release, 3 July 1996, MPS 27/96, <<http://www.minister.immi.gov.au/media/media-releases/1996/r96027.htm>>, accessed 14 July 2012.



<sup>16</sup> Nick Bolkus, Minister for Immigration and Ethnic Affairs, 'Australia's Humanitarian Program Increases by 2,000 Places', Media Release, 24 October 1995, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FRAK20%22>>, accessed 13 August 2012.

<sup>17</sup> Department of Immigration and Multicultural and Indigenous Affairs [henceforth DIMIA], Annual Report 1996-97, <<http://www.immi.gov.au/about/reports/annual/1996-97/html/prog3002.htm>>, accessed 14 July 2012.

<sup>18</sup> Ruddock, '1996-7 Humanitarian Program', Media Release, 3 July 1996, MPS 28/96, <<http://www.minister.immi.gov.au/media/media-releases/1996/r96028.htm>>, accessed 14 July 2012.

<sup>19</sup> See Ruddock, 'Opposition Mistake on Refugee Intake', Media Release, 26 December 1996, MPS 89/96, <[http://pandora.nla.gov.au/pan/31543/20070124-0000/www.minister.immi.gov.au/media\\_releases/ruddock\\_media96/r96089.html](http://pandora.nla.gov.au/pan/31543/20070124-0000/www.minister.immi.gov.au/media_releases/ruddock_media96/r96089.html)>, accessed 25 July 2012.

<sup>20</sup> See Andrew Jakubowicz, 'Cleaning Up the Mess: 1987 - A New Agency in the Prime Minister's Department to Advise on Multicultural Policies', *Making Multicultural Australia*, <<http://www.multiculturalaustralia.edu.au/library/media/Timeline-Commentary/id/117.An-office-for-multicultural-affairs>>, accessed 4 July 2012.

<sup>21</sup> Howard, Australia Day address, 26 January 1997, qtd in Judith Brett, 'Relaxed and Comfortable: The Liberal Party's Australia', *Quarterly Essay*, No. 19 (2005), pp. 1-79, p. 32.

<sup>22</sup> Ruddock, 'Immigration Reform: The Unfinished Agenda', Address to the National Press Club, 18 March 1998, <<http://parlinfo.aph.gov.au/parlInfo/search/display/displayPrint.w3p;query=Id%20per%20cent%22media%20per%20cent%2Fpressrel%20per%20cent%2FRP005%20per%20cent%22>>, accessed 15 May 2012.

<sup>23</sup> According to the Australia Election Study, conducted after the November 2001 election, just 34 per cent of respondents now thought the immigration intake was too high. See Katharine Betts, 'Cosmopolitans and Patriots: Australia's Cultural Divide and Attitudes to Immigration', *People and Place*, Vol. 13, No. 2 (2005), p. 29.

<sup>24</sup> See DIMIA, Fact Sheet, 74a. 'Boat Arrival Details (on Australian Mainland)', 6 October 2004.

<sup>25</sup> Onshore and offshore were distinguished from each other as discreet categories of protection with set quotas (even for unpredictable onshore arrivals) but contained within the same program, the 'Humanitarian and Refugee Resettlement' program. Previously, onshore protection was part of the 'Onshore Program Delivery' program, which was distinct from the 'Offshore Program Delivery'. This did not affect the offshore refugee quota, only the offshore special humanitarian program. The reverse was also true – when the number of onshore humanitarian visas was lower than anticipated, the places could be filled instead by offshore SHP applicants.

<sup>26</sup> Department of Immigration and Citizenship, 'Australia's Humanitarian Program 2011-12', Discussion Paper, December 2010, <[http://www.immi.gov.au/about/contracts-tenders-submissions/\\_pdf/2011-12-humanitarian-program-discussion-paper.pdf](http://www.immi.gov.au/about/contracts-tenders-submissions/_pdf/2011-12-humanitarian-program-discussion-paper.pdf)>, accessed 19 July 2012.

<sup>27</sup> See Stats, 'Welcome to Australia?'. See also Jack Smit, 'The Political Origins and Development of Australia's People Smuggling Legislation: Evil Smugglers or Extreme Rhetoric' (Masters by Research thesis, Edith Cowan University, 2011).

<sup>28</sup> This created antipathy towards onshore asylum seekers not just amongst the general public but also within the refugee community, who saw these arrivals as taking places from family members waiting sponsorship under the SHP. See, for example, recent reports by Stuart Rintoul (designed to highlight consequences of 'bad' refugees for 'good' refugees): 'Boats Leave Fellow Africans Stranded', *The Australian*, 19 July 2012; and 'African Refugees Feel Boatpeople are Squeezing Them Out', *The Australian*, 20 July 2012.

<sup>29</sup> Ruddock, 'Immigration Reform: The Unfinished Agenda'.

<sup>30</sup> See Liberal Senator Concetta Fierravanti-Wells, *Commonwealth Parliamentary Debates*, Senate, 8 September 2009 (fighting Rudd Government amendments to remove the rule), and Ruddock, Speech to National Administrative Law Forum, May 1997 (qtd in Fierravanti-Wells).

<sup>31</sup> Ruddock, 'Immigration Reform: The Unfinished Agenda'.

<sup>32</sup> Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, second edition, (Oxford: Oxford University Press, 2004), p. 24.

<sup>33</sup> Elizabeth Evatt, a former member of the UN Human Rights Committee, qtd in Ann Kent, 'Influences on National Participation in International Institutions: Liberal v. Non-Liberal States', in Hilary Charlesworth, Madelaine Chiam, Devika Hovell and George Williams (eds.), *The Fluid State: International Law and National Legal Systems* (Sydney: Federation Press, 2005), p. 261.

<sup>34</sup> Matthew Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens Under the Migration Act 1958 (Cth)', *Australian Yearbook of International Law*, Vol. 9 (2006); UN Human Rights Committee, Fifty-Ninth Session, 24 March – 11 April 1997, Communication No 560/1993: Australia. 04/30/1997, CCPR/C/59/D/560/1993. (Jurisprudence), <<http://www.unhchr.ch/tbs/doc.nsf/0/30c417539ddd944380256713005e80d3?Opendocument>>, accessed 14 July 2012.

<sup>35</sup> United Nations, Report of the Committee on the Elimination of Racial Discrimination, 56<sup>th</sup> Session (6-24 March 2000), 57<sup>th</sup> Session (31 July-25 August 2000), General Assembly, Official Records, 55<sup>th</sup> Session, Supplement No. 18 (A/55/18), New York, 2000, <<http://www.un.org/documents/ga/docs/55/a5518.pdf>>, accessed 13 September 2012, p. 19.

<sup>36</sup> Alexander Downer, Minister for Foreign Affairs, 'Government to Review UN Treaty Committees', Media Release, 30 March 2000, <[http://pandora.nla.gov.au/pan/25167/20081110-0000/www.foreignminister.gov.au/releases/2000/fa024\\_2000.html](http://pandora.nla.gov.au/pan/25167/20081110-0000/www.foreignminister.gov.au/releases/2000/fa024_2000.html)>, accessed 12 September 2012.

<sup>37</sup> Downer qtd in Tim Lester, 'Australia Headed for Bottom of the Human Rights Barrel', *7:30 Report*, ABC, 31 March 2000, <<http://www.abc.net.au/7.30/stories/s115193.htm>>, accessed 15 September 2012.

<sup>38</sup> Howard qtd in Lincoln Wright, 'Howard Soften on UN', *The Canberra Times*, 3 April 2000.

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- <sup>39</sup> Downer, Attorney-General Daryl Williams and Ruddock, 'Improving the Effectiveness of United Nations Committees', Media Release, 29 August 2000, <[http://pandora.nla.gov.au/pan/25167/20081110-0000/www.foreignminister.gov.au/releases/2000/fa097\\_2000.html](http://pandora.nla.gov.au/pan/25167/20081110-0000/www.foreignminister.gov.au/releases/2000/fa097_2000.html)>, accessed 12 September 2012.
- <sup>40</sup> Attorney-General's Department, Answer to Question No. 7, Output 1.1 for Senate Legal and Constitutional Legislation Committee, Estimate Hearing, 26 May 2003.
- <sup>41</sup> Downer, Williams and Ruddock, 'Improving the Effectiveness of United Nations Committees'.
- <sup>42</sup> Dr Polita Cohona, Head of UN Treaty Section, qtd in Agnes Cusak, 'UN Lashes Back After Australia's Criticism', *AM*, ABC Radio, 31 March 2000, <<http://www.abc.net.au/am/stories/s114945.htm>>, accessed 19 October 2012.
- <sup>43</sup> John Howard, interview with Sally Sara, *AM Programme*, ABC Radio, 18 February 2000.
- <sup>44</sup> Ruddock, 'Immigration Reform: The Unfinished Agenda'.
- <sup>45</sup> See Ruddock press releases, '114 Boat People Returned to China, 23 March 1997, MPS 31/97; '46 Boat People Returned to China', 18 May 1997, MPS 46/97; 'Unlawful Arrivals Sent Back to China', 15 July 1997, MPS 69v/97; all accessible via <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1997/index.html>>, accessed 12 July 2012.
- <sup>46</sup> See press release by Acting Minister for Immigration, Amanda Vanstone, 'Unlawful Arrivals Sent Back to China', 15 July 1997; accessible via <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1997/index.html>>, accessed 12 July 2012.
- <sup>47</sup> Helen Pringle, 'A Brief Display of Humanitarianism', *Online Opinion: Australia's e-Journal of Social and Political Debate*, 23 March 2005, <<http://www.onlineopinion.com.au/view.asp?article=3269>>, accessed 4 October 2012.
- <sup>48</sup> Ruddock on *60 Minutes* [TV program], 6 June 1999, and Howard in an interview on 3AW radio on 18 June 1999, both qtd in *ibid.*
- <sup>49</sup> Pauline Hanson, 'Pauline Hanson's One Nation - Immigration, Population and Social Cohesion Policy', 2 July 1998, <<http://australianpolitics.com/parties/onenation/immigration-policy-98.shtml>>, accessed 1 July 2012.
- <sup>50</sup> *Ibid.*
- <sup>51</sup> *Ibid.*
- <sup>52</sup> The Labor Party, who preferenced One Nation last, retained 44 seats, while the Coalition, who gave their preferences to One Nation lost twelve in total, all but one of them going to One Nation. See George Megalogenis, 'A Tale of Two Elections – One Nation and Political Protest', *Queensland Historical Atlas*, 24 September 2010, <<http://www.qhatlas.com.au/content/tale-two-elections---one-nation-and-political-protest>>, accessed 10 October 2012.
- <sup>53</sup> See Ruddock, 'Dispelling the Myths', Media Release, 1 July 1998, MPS 81/98, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1998/r98081.html>>, accessed 9 August 2012.

<sup>54</sup> Ruddock qtd in Simon Miller, 'Welcoming the Stranger', *Southern Cross Online*, September 1998, <[http://web.archive.org/web/20010425201827/http://www.anglicanmediasydney.asn.au/September/feature\\_s1.html](http://web.archive.org/web/20010425201827/http://www.anglicanmediasydney.asn.au/September/feature_s1.html)>, accessed 21 February 2014.

<sup>55</sup> Dr Michael Woolridge, Minister for Health and Family Services, Speech at the Launch of GP's Manual on Refugee Health and General Practice, 20 August 1998, <<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-archive-mediarel-1998-mwsp980820.htm>>, accessed 10 September 2012.

<sup>56</sup> When the Socialist Federal Republic of Yugoslavia disintegrated in 1992, the republics of Serbia and Montenegro formed the Federal Republic of Yugoslavia (FRY) until 2003, when it became known as the State Union of Serbia and Montenegro. The FRY was not recognised by all countries, including the United States, which referred to it as Serbia and Montenegro. However, between 1996-2006, under the leadership of Milo Dukanovic, Montenegro isolated itself from Serbia in all but name, and the two republics were governed and functioned independently. In June 2006, Montenegro declared independence.

<sup>57</sup> The Independent International Commission on Kosovo estimates that during the NATO air strikes between 24 March and 19 June 1999, approximately 863,000 civilians sought refuge outside Kosovo and an additional 590,000 were internally displaced. See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, [first published in print by Oxford, 2000] Oxford Scholarship Online, 2000, <<http://www.oxfordscholarship.com/view/10.1093/0199243093.001.0001/acprof-9780199243099>>, accessed 13 December 2012.

<sup>58</sup> United Nations High Commissioner Sadako Ogata qtd in 'UNHCR Urges the World to Receive Kosovo Refugees as Exodus Grows', Press Release, 4 April 1999, <<http://www.unhcr.org/3ae6b8111c.html>>, accessed 10 June 2012.

<sup>59</sup> *Ibid.*

<sup>60</sup> Ruddock, 'Extension of Stay', Media Release, 5 April 1999, MPS 55/99, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99055.html>>, accessed 10 June 2012.

<sup>61</sup> Ruddock qtd in Lincoln Wright, 'Refugees: Ruddock Shuts Door', *The Canberra Times*, 6 April 1999, p. 1.

<sup>62</sup> Ruddock in Dennis Shanahan and Penelope Green, 'Cabinet Reverse Block on Asylum', *The Australian*, 7 April 1999, p. 9.

<sup>63</sup> Ruddock, 'Extension of Stay'.

<sup>64</sup> 'Refugee Crisis Needs New Generosity', *The Australian*, 6 April 1999, p. 12.

<sup>65</sup> Howard, Press Conference, Parliament House, Canberra, 6 April 1999, <<http://pandora.nla.gov.au/nph-wb/19990516130000/http://www.pm.gov.au/media/pressrel/1999/pressconference0604.htm>>, accessed 14 July 2012.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Ruddock, 'Second Reading - Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999', *Commonwealth Parliamentary Debates*, House of Representatives, 11 May 1999, p. 5022.

<sup>69</sup> See *Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999*.

<sup>70</sup> See Michael Head, 'The Kosovars and Timorese 'Safe Haven' Refugees: A Test Case for Democratic Rights', *Alternative Law Journal*, Vol. 24, No. 6 (1999), pp. 279-83.

<sup>71</sup> Aban Contractor, 'Australians Reach Out to Kosovo Refugees', *The Canberra Times*, 9 April 1999, p. 1.

<sup>72</sup> See Janine Macdonald, Brendan Nicholson and Sandra McKay, 'Albanian Refugees to be Here Next Week', *The Age*, 9 April 1999, p. 9.

<sup>73</sup> See Meghan Shaw and Fergus Maguire, 'Refugees May go to Families', *The Age*, 27 May 1999, p. 10.

<sup>74</sup> Head, 'The Kosovars and Timorese 'Safe Haven' Refugees', p. 282.

<sup>75</sup> See 'UN Criticises Kosovo Refugee Policy', *BBC News*, 12 April 2000, <<http://news.bbc.co.uk/2/hi/europe/711125.stm>>, accessed 12 August 2010; and James Jupp, *From White Australia to Woomera: The Story of Australian Migration* (Cambridge: Cambridge University Press, 2002), p. 187.

<sup>76</sup> Downer, 'Mine Awareness Training for Kosovo Returnees', Media Release, 17 August 1999, <<http://pandora.nla.gov.au/pan/46874/200501130000/www.ausaid.gov.au/media/release8437.html>>, accessed 12 August 2010.

<sup>77</sup> Ruddock, 'Minister Announces Closure of Brighton and Portsea Safe Havens, Media Release, 27 October 1999, MPS 1515/99, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99151.html>>, accessed 15 August 2012.

<sup>78</sup> See James Jupp, *From White Australia to Woomera: The Story of Australian Migration* (Cambridge: Cambridge University Press, 2002), p. 187.

<sup>79</sup> DIMIA, Fact Sheet, 74a. 'Boat Arrival Details (on Australian Mainland)', 6 October 2004.

<sup>80</sup> Quoted in Nadya Stani, 'How the Media Treats Ethnic Diversity', *The Media Report*, ABC Radio National, 27 January 2000, <<http://www.abc.net.au/radionational/programs/mediareport-1999/how-the-media-treats-ethnic-diversity/3563020>>, accessed 16 August 2012.

<sup>81</sup> Unauthorised boat arrivals exceeded unauthorised air arrivals for the first time at the end of the 1999-2000 financial year. See Tony McInerney, AFP People Smuggling Team, 'People Smuggling – An Inhuman Trade', *Platypus Magazine*, Australian Federal Police, September 2000, <<http://www.afp.gov.au/media-centre/publications/platypus/previous-editions/2000/september-2000/1psmugl.aspx>>, accessed 21 August 2012.

<sup>82</sup> See Angela Romano, 'The News Media's Representation of Asylum Seekers', in Dean Lusher and Nick Hslam (eds.), *Yearning to Breathe Free* (Sydney: Federation Press, 2007), pp. 183-197; Peter Mares, 'Distance Makes the Heart Grow Fonder: Media Images of Refugees and Asylum Seekers', in Edward

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Newman and Joanne Van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (New York: United Nations University Press, 2003), pp. 330-350.

<sup>85</sup> Nadya Stani, 'How the Media Treats Ethnic Diversity', *The Media Report*, ABC Radio National, 27 January 2000, <<http://www.abc.net.au/radionational/programs/mediareport-1999/how-the-media-treats-ethnic-diversity/3563020>>, accessed 16 August 2012.

<sup>84</sup> Ruddock, interviewed by Peter Thompson for ABC Radio National Breakfast program, 16 March 1999, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fradioprnm%2F9S506%22>>, accessed 20 August 2012.

<sup>85</sup> Ruddock, 'Australian Government Position on the MV Tampa Refugees', *Online Opinion*, 15 October 2001, <<http://www.onlineopinion.com.au/view.asp?article=1942>>, accessed 23 October 2012.

<sup>86</sup> Ruddock interview by Dominique Schwartz, 'People Smuggling Linked to Drug Trade', *The World Today*, ABC Radio, 20 January 2000, <<http://www.abc.net.au/worldtoday/stories/s94303.htm>>, accessed 21 August 2012.

<sup>87</sup> Ruddock interviewed by Peter Thompson for Radio National Breakfast program, 16 March 1999.

<sup>88</sup> See Ruddock, 'New Campaign to Stop Illegal Entrants', Media Release, 29 October 1999, MPS 155/99, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99155.html>>, accessed 15 August 2012.

<sup>89</sup> Ruddock, 'New Campaign to Stop Illegal Entrants'.

<sup>90</sup> Ruddock, 'Ruddock Announces Tough New Initiatives', Media Release, 13 October 1999, MPS 143/99, <<http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/1999/r99143.html>>, accessed 15 August 2012.

<sup>91</sup> Article 33: 'No Contracting State shall expel or return ('refoule') a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

<sup>92</sup> TPV holders had the right to work, to special benefits payments and access to Medicare.

<sup>93</sup> Shadow Immigration Minister Con Sciacca, qtd in Sally Sara, 'Opposition Toes the Government Line on Immigration', *AM*, ABC Radio National, 22 November 1999, <<http://www.abc.net.au/am.stories/s67640.htm>>, accessed 16 October 2012.

<sup>94</sup> *Ibid.*

<sup>95</sup> Ruddock, cited in Mike Sexton, 'Asylum Seeker Suicides While on Temporary Protection Visa', *7:50 Report*, 27 May 2003, <<http://www.abc.net.au/7.30/content/2003/s865888.htm>>, accessed 12 September 2011.

<sup>96</sup> See Renae Mann, *Temporary Protection Visa Holders in Queensland*, Multicultural Affairs Queensland, Department of Premier and Cabinet, Brisbane, 2001, qtd in Greg Marston, *Temporary Protection, Permanent Uncertainty: The Experience of Refugees Living on Temporary Protection Visas* (Melbourne: Centre for Applied Social Research RMIT University, 2003), p. 7.

<sup>97</sup> Mann, *Temporary Protection Visa Holders in Queensland*; Fethi Mansouri and M. Bagdas, *Politics of Social Exclusion: Refugees on Temporary Protection Visas in Victoria* (Melbourne: Deakin University, 2002); Greg Marston, 'A Punitive Policy: Labour Force Participation of Refugees on Temporary Protection Visas', *Labour and Industry*, Vol. 15, No. 1 (2004), pp. 65-79; Marston, *Temporary Protection, Permanent Uncertainty*; and Sharon Pickering, Michael Gard and Roslyn Richardson, 'We're Working With People Here': *The Impact of the TPV Regime On Refugee Settlement Service Provision in NSW* (Charles Sturt University and Monash University, 2003). See also, Paul Foley, *The Impact of the Commonwealth's Temporary Protection Visa Policy in South Australia* (Adelaide: SA Government, 2003).

<sup>98</sup> See Marston, 'A Punitive Policy'; Marston, *Temporary Protection, Permanent Uncertainty*.

<sup>99</sup> TPV holder qtd in Arnold Zable, 'Perilous Journeys', in Dean Lusher and Nick Haslam (eds.), *Yearning to Breathe: Seeking Asylum in Australia* (Sydney: Federation Press, 2007), p. 67.

<sup>100</sup> See research by Zachary Steele and Derrick Silove reported in UNSW Centre for Population Mental Health Research, 'Temporary Protection Visas Compromise Refugees' Health: New Research', Media Release, University of New South Wales, 30 January 2004, <[http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV\\_Health.html](http://www.unsw.edu.au/news/pad/articles/2004/jan/TPV_Health.html)>, accessed 21 May 2013.

<sup>101</sup> Mohammad Almousawi, who lost his wife, Sundus Alfaris, in the SIEV X disaster. Qtd in Melissa Fyfe, 'A Broken Man Begs to See His Wife', *The Age*, 3 November 2001.

<sup>102</sup> Pearl Fernandes, team leader of the Early Intervention Project at STARRTS quoting Temporary Protection Visa holders in Zachary Steele, 'The Politics of Exclusion and Denial: The Mental Health Costs of Australia's Refugee Policy', paper presented at the 38<sup>th</sup> Congress Royal Australian and New Zealand College of Psychiatrists, Hobart, May 2003.

<sup>103</sup> Bernard Keane, 'What Happened as a Result of TPVs and the Pacific Solution?', *Crikey*, 6 September 2011, <<http://www.crikey.com.au/2011/09/06/what-happened-as-a-result-of-tpvs-and-the-pacific-solution/>>, accessed 8 September 2011.

<sup>104</sup> See transcripts of survivor accounts of the SIEV X tragedy, translated by Keysar Trad and provided by Tony Kevin, <<http://sievx.com/articles/disaster/KeysarTradTranscript.html>>, accessed 21 September 2010. This tragic image was also reported in the mainstream media. See, for example, Arnold Zable, 'The Tragedy That Australia Refuses to Remember', *The Age*, 19 October 2004, <<http://www.theage.com.au/articles/2004/10/18/1097951626184.html>>, accessed 21 September 2010.

<sup>105</sup> Amal Basry in a report by Geoff Parish on the SIEV X disaster that aired on *Dateline* on the ABC on 17 July 2002, transcript available <<http://sievx.com/articles/challenging/20020717Dateline.html>>, accessed 18 July 2012.

<sup>106</sup> Secretary of the Department of Immigration and Citizenship Andrew Metcalf, Senate Legal and Constitutional Affairs Legislation Committee, Immigration portfolio, Supplementary Budget Estimates 2011–12, 17 October 2011, p. 25.

<sup>107</sup> Their story is recounted in detail in Robert Manne and David Corlett, 'Sending Them Home: Refugees and the New Politics of Indifference', *Quarterly Essay*, No. 13 (2004), pp. 34-37.

<sup>108</sup> Fyfe, 'A Broken Man Begs to See His Wife'.

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<sup>109</sup> See *ibid.*

<sup>110</sup> Robert Manne, 'The Tragedy of Indifference', *The Age*, 24 June 2002, <<http://www.theage.com.au/articles/2002/06/23/1023864527315.html>>, accessed 17 September 2012.

<sup>111</sup> 'We had nothing to do with it. It sank, I repeat, sunk in Indonesian waters, not in Australian waters.' John Howard, interview with Paul Murray, Radio 6PR, 23 October 2001, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=john per cent20howard per cent20Decade per cent3A per cent222000s per cent22 per cent20Year per cent3A per cent222001 per cent22 per cent20Month per cent3A per cent2210 per cent22 per cent20Day per cent3A per cent2223 per cent22;rec=13;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=john%20howard%20per%20decade%20per%20cent%222000s%20per%22%20per%20year%20per%20cent%222001%20per%22%20per%20month%20per%20cent%2210%20per%22%20per%20day%20per%2223%20per%22;rec=13;resCount=Default)>, accessed 19 September 2012.

<sup>112</sup> See Marg Hutton, 'SIEVX & the DFAT Cable: The Conspiracy of Silence', May 2003, <<http://sievx.com/articles/challenging/2003/COS.pdf>>, accessed 19 September 2012.

<sup>113</sup> John Howard qtd in Michael Gordon, 'The Boat that Changed it All', *The Age*, 20 August 2011, <<http://www.smh.com.au/national/the-boat-that-changed-it-all-20110819-1j2o2.html>>, accessed 27 September 2012.

<sup>114</sup> Minutes of the People Smuggling Taskforce, 3:15pm, 23 October 2001, <[http://sievx.com/images/PST/1023\\_2.gif](http://sievx.com/images/PST/1023_2.gif)>, cited in Hutton, 'SIEVX & the DFAT Cable'.

<sup>115</sup> John Howard interviewed by Andrew Fowler for *Four Corners* [TV program], shown in 'Fear and Polling', *Four Corners*, aired 5 November 2001, <<http://www.abc.net.au/4corners/stories/s409081.htm>>, accessed 11 September 2012.

<sup>116</sup> See Tony Kevin, 'Who'll Rescue the Truth of 353 Lives Lost at Sea?', *The Age*, 25 March 2002, p. 15.

<sup>117</sup> Howard, Address at the Federal Liberal Party Campaign Launch.



## **4.2 Rhetorically Speaking: The Rudd Government's 'Tough but Humane' Approach to Asylum Seeking 2007-10**

In 2007, Labor leader Kevin Rudd's promise of a new "tough but humane" approach for dealing with asylum seekers was a key point of difference between the two major parties that arguably contributed to his rise to power. It was the perceived failure of this strategy, amongst other things, that saw him replaced as Prime Minister by his deputy, Julia Gillard, in 2010. In 2013, during his second term as Prime Minister, the substantial increase in unauthorised boat arrivals was highlighted by the Opposition as evidence of the failure of Rudd's "soft" approach and undoubtedly contributed to his Government's demise. Rudd's record continues to be used by the Coalition as a cautionary tale and justification for the maintenance of its tough border control policies. During the 2016 federal election campaign, for example, Malcolm Turnbull's Coalition Government repeatedly warned voters that a Labor victory could lead to a return to the "soft" policies of the Rudd era and the consequential loss of control over Australia's borders.

In this chapter, I critically examine Rudd's "soft" approach to asylum seekers and border control during his first term as Prime Minister. I show how most of the policy changes promised by Rudd in 2007 proved to be symbolic or rhetorical only. Border protection measures were actually increased, offshore processing was maintained (on excised territory rather than in neighbouring countries), mandatory detention retained, and the Government's new detention guidelines were largely ignored. Rudd's approach to asylum seekers in his brief second term as Prime Minister was anything but soft. In July 2013, his Government introduced perhaps the most draconian and devastating border control measures to date with the Regional Resettlement Arrangement with Papua New Guinea (PNG), under which all future asylum seeker arrivals without exception would be removed to PNG and later (after a Memorandum of Understanding was signed in August 2013), also Nauru, for processing and resettlement there or return to their country of origin. The tragic consequences of these policies have recently been seen in the suicide and self-harm (including self-immolations) of desperate and despairing asylum seekers still marooned on Nauru and Manus Island.

Rudd continues to be eulogized by some and damned by others for his approach for dealing with asylum seekers. This chapter thus provides an important corrective to the record. I demonstrate how Rudd's "tough but humane" approach to asylum seekers failed not only according to the traditional measure of success – stopping the boats – but also according to its own objectives, that is, to respond to those seeking refuge in Australia in a more humane fashion. Rather than being the exception to the rule, the Rudd Government's response to a resurgence of unauthorised boat arrivals fit squarely within, and built upon, the Australian tradition epitomised by (but not starting with) the Howard Government's Pacific Solution. In this chapter, I reject and refute the idea of Labor exceptionalism with respects to the reception and treatment of asylum seekers and refugees and reveal the pivotal role Labor has played in the construction of the uncompromising border protection architecture for which the Coalition is often credited.

An abbreviated version of this chapter has been published in the 2017 edition of *Arena Journal* (see Appendix).

### **Rudd's New Rhetoric**

On 24 November 2007, Australians voted decisively for change. After almost 12 years in opposition, the Labor Party led by Kevin Rudd convincingly swept the conservative Liberal-National Coalition from office in what was dubbed a "Ruddslide".<sup>1</sup> Emblematic of the desire for change was the fact that Howard, despite being Australia's second longest-serving Prime Minister, became only the second Prime Minister in Australia's history to lose his seat in an election. In his victory speech, Rudd declared that it was "time for a new page to be written in our nation's history"<sup>2</sup> and set about immediately doing just that with a series of domestic

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<sup>1</sup> See, for example, Phillip Coorey, 'Ruddslide: Polls Show Labor Increasing its Lead', *Sydney Morning Herald*, 12 March 2007; Misha Schubert, 'A Rumble, Then a Ruddslide', *The Age*, 25 November 2007; Trevor Cook, 'Get Ready for the Ruddslide', *ABC Unleashed*, 30 October 2007, <http://www.abc.net.au/unleashed/stories/s2074535.htm>; accessed 9 September 2008; Hugo Kelly and Rebekka Power, 'Inside the Ruddslide', *New Matilda*, <http://newmatilda.com/2007/11/22/inside-ruddslide>; accessed 9 September 2008.

<sup>2</sup> Kevin Rudd, Federal Election 2007 Acceptance Speech, 24th November 2007, <http://www.alp.org.au/media/1107/spepme240.php>; accessed 30 November 2007.

reforms. These included offering an official apology to the Stolen Generations, rolling back the Coalition's unpopular industrial relations legislation, establishing a National Health and Hospital Reform Commission, and beginning the promised education 'revolution' – all within his Government's first 100 days in office.

The new Government further distinguished itself from the old with a new direction in its international relations and global engagement. Whereas Howard had been avowedly nationalist,<sup>3</sup> Rudd was keen to reassert Labor's traditional internationalism and to recover Australia's reputation as a good international citizen.<sup>4</sup> This was perhaps most powerfully signalled by the Government's ratification of the Kyoto Protocol immediately after assuming office. Whereas Howard had insisted that Kyoto was not in Australia's interest, Rudd regarded it as integral to the national interest since "a failure to engage with the global community on climate change would exclude [Australia] from the chance to shape the global response in ways consistent with [Australia's] national interests".<sup>5</sup> Citing "Chif" (former Labor Prime Minister Ben Chifley) as an inspiration, Rudd expressed his determination to see Australia "[n]ot simply drifting into the future, but actively shaping the future".<sup>6</sup> To this end, he announced the Government's intentions to seek a seat for Australia on the Security Council in 2013-2014 in order to "be comprehensively, not marginally, engaged" with the UN.<sup>7</sup> Rudd also highlighted the European Union (EU) as a new foreign policy priority, and included an overnight stopover in Brussels to meet with the President of the European

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<sup>3</sup> Under Howard, foreign policy was framed almost exclusively in terms of the national interest as indicated by the titles of its foreign and trade policy White Papers, *In the National Interest* (1997) and *Advancing the National Interest* (2003). Moreover, the language of "good international citizenship" that Labor had inserted into Australia's political vocabulary in the post-war period was deliberately removed from the Government's foreign policy discourse. See Department of Foreign Affairs and Trade (DFAT), *In the National Interest: Australia's Foreign and Trade Policy White Paper*, DFAT, Canberra, 1997; Department of Foreign Affairs and Trade, *Advancing the National Interest: Australia's Foreign and Trade Policy White Paper*, Commonwealth of Australia, Canberra, 2003.

<sup>4</sup> Robert McClelland, 'Regaining Australia's International Reputation', speech to ALP National Conference, 29 April 2007, <http://www.alp.org.au/media/0407/spefa291.php>; accessed 15 September 2008; Kevin Rudd, address to the Australian Labor Party NSW Branch State Conference, Sydney, 4 May 2008, [http://www.pm.gov.au/media/speech/2008/speech\\_0233.cfm](http://www.pm.gov.au/media/speech/2008/speech_0233.cfm); accessed 8 May 2008.

<sup>5</sup> Kevin Rudd, 'Advancing Australia's Global and Regional Economic Interests', address to the East Asia Forum in conjunction with the Australian National University, 26 March 2008, [http://www.pm.gov.au/media/speech/2008/speech\\_0145.cfm](http://www.pm.gov.au/media/speech/2008/speech_0145.cfm); accessed 20 May 2008.

<sup>6</sup> Rudd, address to the Australian Labor Party NSW Branch State Conference.

<sup>7</sup> *Ibid.*

Commission on his inaugural international tour, the first Australian Prime Minister to do so. These were all highly symbolic acts, distancing the new Government from its predecessor, reflecting its commitment to both internationalism and multilateralism (enshrined as the “second pillar” of Labor’s foreign policy), and signalling its intention to adopt “an increasingly activist Australian international policy”.<sup>8</sup>

Moreover, there was a new cosmopolitan imperative to the political narrative, which Rudd made explicit, arguing, “we need to be guided by a new principle that encompasses not only what Australia can do for itself, but also what Australia can do for the world”.<sup>9</sup> Although he echoed Howard’s mantra when he pledged on election night to “always govern in the national interest”,<sup>10</sup> for Rudd, the national interest was not separate to, or necessarily at odds with, the international interest. Rather, he argued, “[f]oreign policy, foreign economic policy and national security policy must increasingly be seen as the natural expression and extension of the nation’s domestic policy interests – not as some sort of policy exotica removed from the Australian mainstream, but as part and parcel of the interests of main-street Australia”. In this way, Rudd relocated the national interest in an international context, such that “[a]cting nationally now requires acting internationally”.<sup>11</sup>

One area in which this new cosmopolitan flavour was evident was asylum policy. The ALP’s approach to refugees and asylum seekers under Rudd was a point of policy difference that arguably contributed to its election victory and characterised the new Government in the early days of its incumbency. Although he supported the mandatory detention of asylum seekers and deterrence policies such as the interdiction and turning back of asylum seeker boats at sea,<sup>12</sup> during the election campaign Rudd decried the Howard Government’s Pacific

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<sup>8</sup> *Ibid.*

<sup>9</sup> Kevin Rudd, ‘Faith in Politics’, *The Monthly*, vol. 17, October 2006, <http://www.themonthly.com.au/tm/node/300>; accessed 10 September 2008.

<sup>10</sup> Rudd, Federal Election 2007 Acceptance Speech.

<sup>11</sup> Rudd, ‘Advancing Australia’s Global and Regional Economic Interests’. See also, Rudd, speech at the opening of the Hedley Bull Centre, Australian National University, 6 August 2008, [http://www.pm.gov.au/media/Speech/2008/speech\\_0399.cfm](http://www.pm.gov.au/media/Speech/2008/speech_0399.cfm); accessed 15 August 2008.

<sup>12</sup> Paul Kelly and Dennis Shanahan, ‘Rudd to Turn Back Boatpeople’, *The Australian*, 23 November 2007.

Solution to the asylum seeker ‘problem’ as “just wrong” and “a waste of taxpayers money” and promised to end it.<sup>13</sup>

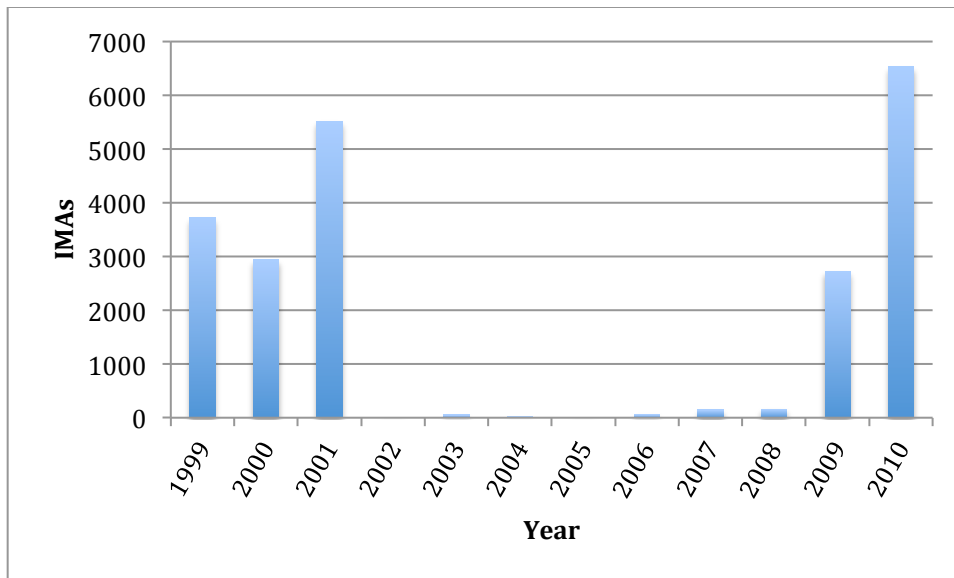
### **The Pacific Solution 2001-2007**

Since the implementation of the Pacific Solution in late 2001, boat arrivals had been negligible; just 18 boats in total had arrived between 2002 and 2007, carrying fewer than 300 asylum seekers in contrast to the 5,516 irregular maritime arrivals (IMAs) who had arrived in 2001 alone (see Figure 4.2.1). In the absence of significant numbers of boat arrivals, public sentiment about the Howard government’s border policies, so crucial to Howard’s victory in 2001, had shifted dramatically by 2007, from focusing on the necessity of those policies to their effects on those who had defied them to travel unauthorised to Australia anyway.<sup>14</sup>

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<sup>13</sup> Kevin Rudd, interview with Kerry O’Brien, *7:30 Report*, ABC, 21 November 2007, <http://www.abc.net.au/7.30/content/2007/s2096954.htm>; accessed 1 December 2007.

<sup>14</sup> See, for example, Kazimierz Bem, *et al.*, ‘A Price Too High: The Cost of Australia’s Approach to Asylum Seekers’, A Just Australia, Oxfam Australia and Oxfam Novib, August 2007, <http://www.ajustaustralia.com/resource.php?act=attache&id=213>; accessed 13 January 2012; Julian Burnside, speech at the Victorian launch of Refugee Week, 22 October 2006, <http://www.refugeecouncil.org.au/r/spch/061022-RW-JBurnside.pdf>; accessed 18 February 2013; Jewel Topsfield, ‘Refugees: Now for the US Solution’, *The Age*, 18 April 2007, <http://www.theage.com.au/news/national/refugees-now-for-the-us-solution/2007/04/17/1176696837259.html?page=fullpage#>; accessed 22 January 2013.



**Figure 4.2.1: Irregular maritime arrivals to Australia 1999-2010**

Source: Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia Since 1976’, background note, Parliamentary Library, updated 23 July 2013, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5P1X6/upload\\_binary/5P1X6.pdf](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5P1X6/upload_binary/5P1X6.pdf); accessed 25 March 2015.

Medical professionals and refugee advocates had long expressed concerns and demonstrated the deleterious effects of Australia’s detention policies on vulnerable asylum seekers.<sup>15</sup> Described as “psychosocially destructive environments”<sup>16</sup> by the president of the Public Health Association of Australia, Dr Peter Sainsbury, Australia’s immigration detention centres had been shown to foster mental health issues in asylum seekers, which frequently

<sup>15</sup> On the noted effects of mandatory detention see, for example, Risé Becker and Derrick Silove, ‘The Psychiatric and Psychosocial Effects of Prolonged Detention’, in Mary Crock (ed.), *Protection or Punishment? The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993, pp. 81-90; Ron Kessels and Maritsa Eftimiou, ‘Effects of Incarceration’, in Mary Crock (ed.), *Protection or Punishment? The Detention of Asylum-Seekers in Australia*, The Federation Press, Sydney, 1993, pp. 91-5; Human Rights and Equal Opportunity Commission (HREOC), *Those Who’ve Come Across the Seas: Detention of Unauthorised Arrivals*, HREOC, Canberra, 1998; Australian Human Rights Commission, ‘Report on Visits to Immigration Detention Facilities by the Human Rights Commissioner 2001’, [http://humanrights.gov.au/human\\_rights/immigration/idc2001.html#major](http://humanrights.gov.au/human_rights/immigration/idc2001.html#major); accessed 19 February 2013; Derrick Silove, Zachary Steel and Richard Mollica, ‘Detention of Asylum Seekers: Assault on Health, Human Rights and Social Development’, *The Lancet*, vol. 357, 5 May 2001, pp. 1436-7; Zachary Steel and Derrick Silove, ‘The Mental Health Implications of Detaining Asylum Seekers’, *Medical Journal of Australia*, vol. 175, no. 11, 2001, pp. 596-9; Amer Sultan and Kevin O’Sullivan, ‘Psychological Disturbances in Asylum Seekers Held in Long Term Detention: A Participant-Observer Account’, *Medical Journal of Australia*, vol. 175, 2001, pp. 593-6; Francesco Motta, “‘Between a Rock and a Hard Place’: Australia’s Mandatory Detention of Asylum Seekers”, *Refuge*, vol. 20, no. 3, 2002, pp. 12-43; HREOC, *A Last Resort? National Inquiry into Children in Immigration Detention*, HREOC, Canberra, April 2004.

<sup>16</sup> Public Health Association of Australia, ‘Refugee Policy Creates Health Problems’, media release, 2002 <http://www.phaa.net.au/media/RefugeeMedia%20Release.htm>; accessed 1 July 2004.

led to self-harm episodes and suicide attempts.<sup>17</sup> A 1998 inquiry by the Human Rights and Equal Opportunity Commission into detention conditions found that “[m]ental distress in varying degrees [was] a common manifestation in detained asylum seekers” and that “[a]ppropriate mental health care services [were] not readily available to detainees”, who were not formally assessed to identify those requiring specialist care.<sup>18</sup> Research comparing the experiences of Tamil refugees in detention and the community showed that those arriving in an unauthorised manner (i.e. by boat) and detained as a result had higher levels of pre-migration trauma (hence, perhaps, their propensity to resort to desperate measures to seek refuge) than compatriots who arrived in an authorised manner either as migrants, resettled refugees or asylum seekers and were thus not subject to immigration detention.<sup>19</sup> That is to say, the most vulnerable cohort of people were subject to the most harmful treatment after their arrival in Australia. Numerous studies showed that the degree of mental illness was exacerbated by the length of time spent in detention.<sup>20</sup> Moreover, a study of the health records of approximately 10% of people in detention between July 2005 and 30 June 2006 showed that both the length of time spent in detention and the reason for incarceration were significantly related to the rate of *new* mental health problems.<sup>21</sup>

These effects became more visible when frustrations amongst detained asylum seekers culminated in protests, notably (but not only) at Woomera in January 2002, where 64 detainees sewed their lips together and more than 200, including 36 minors, participated in a hunger strike in protest at the conditions and lengthy delays in the processing of their asylum

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<sup>17</sup> McLoughlin and Warin, ‘Corrosive Places, Inhuman Spaces’, p. 262.

<sup>18</sup> HREOC, *Those Who’ve Come Across the Seas*.

<sup>19</sup> Maritza Thompson and Patrick McGorry, ‘Maribyrnong Detention Centre Tamil Survey’, in Derrick Silove and Zachary Steel (eds), *The Mental Health and Well-Being of Onshore Asylum Seekers in Australia*, Psychiatry Research & Teaching Unit, University of New South Wales, Sydney, 1998, pp. 27-31; Derrick Silove, *et al.*, ‘Trauma Exposure, Postmigration Stressors, and Symptoms of Anxiety, Depression and Posttraumatic Stress in Tamil Asylum Seekers: Comparisons with Refugees and Immigrants’, *Acta Psychiatrica Scandinavica*, vol. 97, 1998, pp. 175-81.

<sup>20</sup> See Aamer Sultan and Kevin O’Sullivan, ‘Psychological Disturbances in Asylum Seekers Held in Long Term Detention: A Participant-Observer Account’, *Medical Journal of Australia*, vol. 175, 2001, pp. 593-6; Zachary Steel, *et al.*, ‘Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees’, *British Journal of Psychiatry*, vol. 188, 2006, pp. 58-64.

<sup>21</sup> Janette Green and Kathy Eagar, ‘The Health of People in Australian Immigration Detention Centres’, *Medical Journal of Australia*, vol. 192, vol. 2, 2010, pp. 65-70.

applications.<sup>22</sup> The Howard Government was relentless in its depiction of these desperate actions as evidence of the bad character of asylum seekers (“people like that”), for whom the public should harbour no sympathy, in order to deflect attention away from detention conditions and the effects of its policies on detainees. Immigration Minister Philip Ruddock, for example, responded somewhat callously to concerns about the conditions, pointing out that “[d]etention centres are not jails. [Detainees] have freedoms and liberties, and those freedoms and liberties include sewing.”<sup>23</sup> He tried to depict this behaviour as alien and barbaric rather than a desperate cry for help, arguing that “[l]ip sewing is a practice unknown in our culture. It’s something which offends the sensitivities of Australians.”<sup>24</sup> Nevertheless, these protests were effective in drawing the gaze of the media, both domestically and internationally, and the attention of the UN.

After expressing concerns about Australia’s mandatory detention and conditions in the detention centres to Foreign Minister Alexander Downer in February 2002, the United Nations High Commissioner for Refugees, Mary Robinson, sent a personal envoy, Justice Prafullachandra Natwarlal Bhagwati, Regional Adviser for Asia and the Pacific of the UNHCR, to inspect and report on Australia’s immigration detention centres. Bhagwati’s visit coincided with that of a delegation of the UN Economic and Social Council Working Group on Arbitrary Detention in May-June 2002. Both were highly critical of Australia’s system of immigration detention. Louis Joinet, Chairman-Rapporteur of the Working Group, suggested that convicted criminals were treated better than immigration detainees in Australia, who lived in similar conditions but with “agonising uncertainty”.<sup>25</sup> This uncertain existence contributed to the “collective depression syndrome” the delegation observed. In addition to the psychological impact of detention, particularly on vulnerable persons including children,

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<sup>22</sup> On 28 January 2002, the Immigration Minister Philip Ruddock reported that there were 287 asylum seekers in detention, including five children, on hunger strikes, and 41 had stitched their lips together as a protest. See Philip Ruddock, ‘Detention Update’, 28 January 2002, <http://www.minister.immi.gov.au/detention/update.htm>; accessed 19 February 2013.

<sup>23</sup> Philip Ruddock quoted in Annabel Crabb, ‘Legal Move Mooted on Asylum Children’, *The Age*, 21 January 2002, p. 3.

<sup>24</sup> Philip Ruddock quoted in Andrew West, ‘Asylum-seeker Teenagers Join Lip Sewing Protest’, *Sun Herald*, 20 January 2002, p. 7.

<sup>25</sup> Michael Millett and Michael Bradley, ‘Criminals “Better Off” than Asylum Seekers’, *Sydney Morning Herald*, 7 June 2002.



the delegation expressed concerns about the automatic and indiscriminate nature of Australia's mandatory detention regime, its potentially indefinite duration, the absence of juridical control of detention and restrictions on judicial review, exclusion of detainees from legal aid and the lack of a proper complaints mechanisms. They also expressed concerns about the implications of the private management of detention centres.<sup>26</sup> Bhagwati, whose mandate was limited to human rights issues rather than issues of legality or the refugee status determination procedure in Australia, was "considerably distressed" by what he witnessed in the Woomera detention centre. He too cited concerns about the extended and indefinite length of detention, lack of judicial review, transparency, independent overview and accountability mechanisms, the separation of families in detention and the prohibition of family reunification for temporary protection visa holders, and lack of access to legal aid and other social services for detainees. He was particularly concerned about the impact of detention on the physical and mental health of incarcerated children and noted a conflict of interest arising from the twin roles of the Minister for Immigration as both the detainer and guardian of unaccompanied minors.<sup>27</sup> He concluded "that the human rights situation of persons in immigration detention in Australia is a matter of serious concern" and could "be considered inhuman and degrading".<sup>28</sup>

The Howard Government responded angrily, as it had in the past (as described in the previous chapter, 4.1 'We Will Decide'),<sup>29</sup> to criticism from these UN observers, describing Bhagwati's report as "fundamentally flawed", lacking objectivity and full of "emotive descriptions and assertions",<sup>30</sup> while the UN Working Group on Arbitrary Detention's report

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<sup>26</sup> United Nations Commission on Human Rights, *Report of the Working Group on Arbitrary Detention: Addendum: Visit to Australia (24 May - 6 June 2002)*, 24 October 2002, E/CN.4/2003/8/Add.2, <http://www.unhcr.org/refworld/docid/3e2e7ca54.html>; accessed 2 April 2013.

<sup>27</sup> See Justice Prafullachandra Natwarlal Bhagwati, Regional Adviser for Asia and the Pacific of the UNHCR, 'Human Rights and Immigration Detention in Australia', Report from Mission to Australia, 24 May to 2 June 2002, republished in 'Australia's Refugee Detention Policy', *Sydney Morning Herald*, 31 July 2002.

<sup>28</sup> *Ibid.*

<sup>29</sup> Katrina Stats, 'We Will Decide: Refugee and Asylum Policy During the Howard Era Before Tampa', *Australian Studies*, vol. 7, 2015, pp. 5-6.

<sup>30</sup> Philip Ruddock, Alexander Downer and Daryl Williams, 'Government Rejects the Report of the UN Human Rights Commissioner's Envoy into Human Rights and Immigration Detention', joint media release, MPS 71/2002, <http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/2002/r02071.html>; accessed 23 February 2013.

was dismissed as “a very disappointing effort” that contained “fundamental factual errors”, lacked credibility and was “misguidedly critical of Australia”.<sup>31</sup> Downer retorted, “We do not run off to the United Nations asking how Australia should be run ... whatever the rights and wrongs of these issues, we will decide them for ourselves, not have the bureaucrats in Geneva decide them for us.”<sup>32</sup> Ruddock rather ironically claimed that such inspections of detention centre conditions were harming detainees, suggesting that “incidents of self-harm and exhibitions of collective depression increase significantly with the number of visits undertaken”.<sup>33</sup> The Government continued to justify the maintenance of its tough policies with the twin mantras of national security and sovereignty:

Immigration detention is an essential element underpinning the integrity of Australia’s migration program and the protection of our borders. The policies reflect Australia’s sovereign right under international law to determine who will enter our borders and be permitted to remain, and the conditions under which they may be removed.<sup>34</sup>

However, with few new boat arrivals, this uncompromisingly tough stance began to seem excessive, especially in the face of such damning international criticism, and excessively expensive. Research highlighting the human and financial costs of the Pacific Solution began to gain traction in the media, the \$1 billion price tag for outsourcing the processing of less than 1,700 asylum seekers over six years appearing increasingly exorbitant.<sup>35</sup> Moreover, the release of the Government-commissioned Palmer and Comrie reports, which investigated the wrongful detainment of Australian citizens, Cornelia Rau and Vivian Alvarez Solon (who was also unlawfully deported to the Philippines), in 2005 highlighted the flaws and dangers of an overly officious system of detention and deportation.

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<sup>31</sup> Alexander Downer and Philip Ruddock, ‘Government Rejects UN Report on Arbitrary Detention’, media release, FA184, 13 December 2002, [http://www.foreignminister.gov.au/releases/2002/fa184a\\_02.html](http://www.foreignminister.gov.au/releases/2002/fa184a_02.html); accessed 23 February 2013.

<sup>32</sup> Downer in Parliament, quoted in Millett and Bradley, ‘Criminals “Better Off” Than Asylum Seekers’.

<sup>33</sup> Ruddock, press conference 6 June 2002, reported in Michael Madigan, ‘Detainees Depressed After Visits’, *Herald-Sun*, 7 June 2002, p. 11.

<sup>34</sup> Ruddock, Downer and Williams, ‘Government Rejects the Report of the UN’.

<sup>35</sup> Bem, *et al.*, ‘A Price Too High’, p. 4.

As a result, public opinion began to shift. Whereas 13% of respondents in the 2001 Australian Electoral Study had cited refugees and asylum seekers as the most important issue to them during the 2001 election campaign, this had dropped to just 2.7% during the 2004 election campaign.<sup>36</sup> By 2007, ‘illegal immigration’ had greatly diminished as a pressing issue in the minds of the public. It had rated in the top five issues for 17% of respondents in an AustraliaSCAN survey in 2003 (when the polling series had begun), but by 2007, this had dropped to just 7%.<sup>37</sup> A shift in community concerns from the *effectiveness* to the *effects* of the policies allowed for a shift in the political rhetoric, which Rudd, who positioned himself as a compassionate humanitarian in contrast to Howard’s reputation as a hard-nosed realist, sought to exploit.

### **The Good Samaritan – Rudd in Opposition**

Rudd’s position on asylum was explicitly influenced by his Christian beliefs. Back in 2006, before he had wrested the Labor leadership from then-Opposition leader Kim Beazley, Rudd wrote, in an essay entitled ‘Faith in Politics’ for *The Monthly*, of his admiration for the German theologian Dietrich Bonhoeffer, “without doubt, the man I admire most in the history of the twentieth century”.<sup>38</sup> Bonhoeffer, a “Christian pastor, committed social democrat and passionate internationalist”, had been executed in 1945, just before the end of the war, for his involvement in a plot to assassinate Hitler. Bonhoeffer, Rudd explained, was, above all, “a man of action who wrote prophetically in 1937 that ‘when Christ calls a man, he bids him come and die.’ For Bonhoeffer, whatever the personal cost, there was no moral alternative other than to fight the Nazi state with whatever weapons were at his disposal.”<sup>39</sup> In line with Bonhoeffer’s teachings, Rudd argued that the core principle shaping

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<sup>36</sup> Ian McAllister and Juliet Pietsch, ‘Trends in Australian Political Opinion: Results from the Australian Election Study, 1987-2010’, Australian National Institute for Public Policy and ANU College of Arts and Social Sciences, Canberra, 2011, <http://aes.anu.edu.au/sites/default/files/Trends%20in%20Australian%20Political>; 23 February 2013.

<sup>37</sup> Murray Goot and Ian Watson, ‘Population, Immigration and Asylum Seekers: Patterns in Australian Public Opinion’, Parliament of Australia, Parliamentary Library, Pre-Election Policy Unit, May 2011, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/~media/05%20About%20Parliament/54%20Parliamentary%20Depts/544%20Parliamentary%20Library/Pub\\_archive/Goot.ashx](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/~media/05%20About%20Parliament/54%20Parliamentary%20Depts/544%20Parliamentary%20Library/Pub_archive/Goot.ashx); accessed 20 April 2012.

<sup>38</sup> Rudd, ‘Faith in Politics’.

<sup>39</sup> *Ibid.*

Christianity's engagement with the state should be that it "always take the side of the marginalised, the vulnerable and the oppressed" and that this should "help to shape our view of what constitutes appropriate policy for the community, the nation and the world".<sup>40</sup> Acknowledging that asylum seekers were one of the great challenges of this era, Rudd suggested that "[t]he biblical injunction to care for the stranger in our midst is clear. The parable of the Good Samaritan is but one of many which deal with the matter of how we should respond to the a vulnerable stranger in our midst."<sup>41</sup> As Rudd noted, Bonhoeffer himself had helped to organise the evacuation of German Jews to Switzerland in the early 1940s, at a time when Australia was busy limiting avenues for Jewish immigration. Indeed, it was his involvement in these efforts that saw him arrested before he was later implicated in, and executed for, his role in the assassination plot.

Rudd urged Australians to "never forget that the reason we have a UN convention on the protection of refugees is in large part because of the horror of the Holocaust, when the West (including Australia) turned its back on the Jewish people of Germany and the other occupied countries of Europe who sought asylum during the '30s".<sup>42</sup> In 2007, as Opposition leader, Rudd declared himself to be "a great believer" and "passionate defender" of the 1951 United Nations Convention Relating to the Status of Refugees.<sup>43</sup> "If you look at the history of the Convention", Rudd reminded us, "it came about because after World War II we resolved that we will never stand idly by and allow something like the Holocaust unfold."<sup>44</sup> He was determined to

make sure this country maintains an open heart ... if we, as one of the initiators of the post-war Refugee Convention consensus, are seen to be fragmenting it at the edges, we are also part and parcel of fragmenting the global consensus and

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Kevin Rudd, interview with Kerry O'Brien, *7:30 Report*, ABC, 21 November 2007, <http://www.abc.net.au/7.30/content/2007/s2096954.htm>; accessed 1 December 2007.

<sup>44</sup> *Ibid.*

machinery for dealing with refugee challenges into the future. I never want to be part of a government that does that.<sup>45</sup>

### **A New Era? Dismantling the Pacific Solution**

All this suggested Rudd believed in a very different approach to asylum seekers than the Howard Government, which had sought to close every avenue available to asylum seekers, repudiating and retreating from the international system of refugee protection. And indeed, after its stunning election victory, the Rudd Government immediately set about dismantling the Pacific Solution as promised. With the closure of the detention facilities on Manus Island and Nauru in February 2008, the new Minister for Immigration Chris Evans declared a “shameful and wasteful chapter in Australia’s immigration history” over.<sup>46</sup> Processing of asylum seekers would now take place on Australian territory, namely Christmas Island, although this still remained excised from the migration zone. In July 2008, Evans announced a new risk-based approach to detention. Mandatory detention was retained for all unauthorised boat arrivals – a pre-election pledge – but it was to be guided by a new set of values under the Government’s ‘New Directions in Detention’ policy.<sup>47</sup> It was to be used only as “a last resort and for the shortest time practicable” and the onus would be on the Department of Immigration to justify continued detention, which would be subject to three-monthly reviews.<sup>48</sup> The “presumption of detention”<sup>49</sup> was to be replaced with the assumption that, after a brief period of detention for identity, health and security checks, asylum seekers would be housed in the community while their claims were processed. Children would not be

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<sup>45</sup> Kevin Rudd, speech to the Australia Christian Lobby, August 2007, quoted in David Marr, ‘Power Trip: The Political Journey of Kevin Rudd’, *Quarterly Essay*, vol. 38, 2010, pp. 66-7.

<sup>46</sup> Chris Evans, address to the 2008 National Members’ Conference of the Migration Review Tribunal and Refugee Review Tribunal, The Windsor Hotel, Melbourne, 29 February 2008, <http://www.minister.immi.gov.au%20/media/speeches/2008/ce08-29022008.htm>; accessed 4 September 2008.

<sup>47</sup> Chris Evans, ‘New Directions in Detention: Restoring Integrity to Australia’s Immigration System’, speech delivered to Centre for International and Public Law, ANU, 29 July 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>; accessed 9 September 2008.

<sup>48</sup> *Ibid.*

<sup>49</sup> Joint Standing Committee on Migration, *Immigration Detention in Australia: A New Beginning: Criteria for Release from Immigration Detention*, First Report of the Inquiry into Immigration Detention in Australia, Canberra, December 2008, pp. viii and xi, <http://www.aph.gov.au/house/committee/mig/detention/report.htm>; accessed 1 May 2016.

subject to detention regardless of the circumstances of their arrival.<sup>50</sup> Detainees would now have access to publicly funded legal assistance and independent review of negative assessments.<sup>51</sup> Mandatory temporary protection visas, which had denied their “beneficiaries” (refugees who had arrived in an unauthorised manner) permanent residency, the right to work and access to social services such as Medicare and Centrelink, as well as the right to sponsor family members, were abolished in May 2008.<sup>52</sup> They were replaced by a resolution of status visa, which granted unauthorised asylum-seekers the same suite of benefits and entitlements as a permanent protection visa holder. In March 2009, Evans announced the end of charging asylum seekers for their enforced and indefinite detention, a practice unique to Australia (and to immigration detention – even criminals are not charged for their incarceration) that had been introduced with mandatory detention by the Keating Labor Government.<sup>53</sup> The so-called 45-day rule, which prevented asylum seekers who did not apply for refugee status within 45 days of their arrival in Australia from working, was scrapped from July 2009.<sup>54</sup> In addition to these reforms, the Government increased the humanitarian quota by 500 places in 2008-9 and by a further 250 in 2009-10.

As well as these policy measures, there was a deliberate attempt to reframe the asylum debate rhetorically. In accordance with Rudd’s professed beliefs about society’s duty to care for the vulnerable stranger, the Government explicitly repudiated the demonisation of asylum seekers, who had been cast as a criminal and cultural threat by the previous Government.<sup>55</sup>

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<sup>50</sup> Chris Evans, ‘Labor Unveils New Risk-Based Detention Policy’, media release, 29 July 2008, <http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>; accessed 20 September 2008.

<sup>51</sup> Evans, ‘New Directions in Detention’.

<sup>52</sup> Chris Evans, ‘Budget 2008-09 – Rudd Government Scraps Temporary Protection Visas’, 13 May 2008, <http://www.minister.immi.gov.au/media/media-releases/2008/ce05-buget-08.htm>; accessed 20 December 2010.

<sup>53</sup> Chris Evans, ‘Detention Debt Regime to be Scrapped’, media release, 18 March 2009, <http://www.minister.immi.gov.au/media/media-releases/2009/ce09031.htm>. Parliament passed the Migration Amendment (Abolishing Detention Debt) Bill 2009 on 8 September 2009.

<sup>54</sup> Chris Evans, ‘Migration Changes from 1 July’, media release, 1 July 2009, <http://www.minister.immi.gov.au/media/media-releases/2009/ce09061.htm>; accessed 16 February 2013. The amendment passed the Senate with the help of Liberal Senator Judith Troeth, who crossed the floor in support of it on 8 September 2009.

<sup>55</sup> See Chris Evans, ‘Refugee Policy Under the Rudd Government – The First Year’, address to the Refugee Council of Australia, Parramatta Town Hall, 17 November 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm>; accessed 6 January 2012.

However, if there was one lesson the new Government had taken from the Howard period, it was that the public responded to a government committed to strong border security, especially in the post-9/11 era. And so instead, it targeted people smugglers, identified by Home Affairs Minister Brendan O'Connor as one of five key threats to the nation (along with terrorism, smuggling of illicit goods, bio-security risks and illegal foreign fishing), as the requisite enemy.<sup>56</sup> Rudd himself was especially vehement in this respect, declaring

People smugglers are engaged in the world's most evil trade and they should all rot in jail because they represent the absolute scum of the earth ... People smugglers are the vilest form of human life. They trade on the tragedy of others and that's why they should rot in jail and in my own view, rot in hell.<sup>57</sup>

Thus, there was a distinct shift from the “deliberately tough” regime of the Howard Government<sup>58</sup> to a new “tough but humane” approach to border control and asylum seekers.<sup>59</sup> As Evans explained, “We firmly believe that we can have strong and effective border security while also treat[ing] people seeking our protection with fairness and humanity.”<sup>60</sup> The “tough” aspects of the policies targeted people smugglers while the fair and effective detention policies were designed to improve the lot of their unfortunate passengers. This allowed the Government to continue with the popular strong border control measures (surveillance, interdiction, criminalisation) while maintaining a clear distinction between it and its predecessor in its treatment of asylum seekers.

In the absence of significant numbers of unauthorised asylum seekers arriving by boat – just 148 and 161 in 2007 and 2008 respectively – these changes were relatively uncontroversial

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<sup>56</sup> Brendan O'Connor cited in Yuko Narushima, '98 More Asylum Seekers off to Christmas Island', *The Age*, 24 September 2009, <http://www.theage.com.au/national/98-more-asylum-seekers-off-to-christmas-island-20090923-g2ok.html>; accessed 24 September 2009.

<sup>57</sup> Kevin Rudd, 17 April 2009, following an explosion aboard an asylum seeker boat that resulted in five deaths and more than 44 casualties. Quoted in Emma Rodgers, 'Rudd Wants People Smugglers to “Rot in Hell”', *ABC News*, 17 April 2009, <http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814>; accessed 17 April 2009.

<sup>58</sup> Philip Ruddock, 'Australian Government Position on the MV Tampa Refugees', *Online Opinion*, 15 October 2001, <http://www.onlineopinion.com.au/view.asp?article=1942>; accessed 23 October 2012.

<sup>59</sup> See, for example, Kevin Rudd, interview with Kerry O'Brien, *7:30 Report*, 22 October 2009, <http://pandora.nla.gov.au/pan/79983/20091030-1529/www.pm.gov.au/node/6269.html>; accessed 17 January 2013.

<sup>60</sup> Evans, 'Refugee Policy Under the Rudd Government – The First Year'.

and were well received, and the Rudd Government enjoyed a period of political buoyancy in the first two years of its incumbency (see Figures 4.2.2 and 4.2.3). “Labor’s audacious experiment”<sup>61</sup> was promoted and perceived as being more humane, in keeping with Australia’s humanitarian obligations and more in line with Australia’s tradition of liberal internationalism. The changes were described by Evans as “returning humanity and fairness to Australia’s refugee policies”<sup>62</sup> and were praised by refugee advocates as “humane and sensible reforms”.<sup>63</sup> Paul Power, head of the Refugee Council of Australia, described these steps as “the most positive and far-reaching change in Australian history to policies relating to asylum seekers”,<sup>64</sup> while the UN’s High Commissioner for Refugees Antonio Guterres reportedly described Australia as a “model asylum country” at the 2008 meeting of the Executive Committee of the UNHCR, acknowledgement of considerable change since the Howard era of which it had been so critical.<sup>65</sup> Tellingly, the Refugee Action Committee, a Canberra-based refugee advocacy group made up of a “network of concerned citizens” dwindled to just four active members meeting irregularly.<sup>66</sup>

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<sup>61</sup> Paul Kelly, ‘Rudd’s Softer Stance Mugged by Reality’, *The Australian*, 17 October 2009, <http://www.theaustralian.news.com.au/story/0,25197,26220271-12250,00.html>; accessed 20 October 2009.

<sup>62</sup> Evans, ‘Refugee Policy Under the Rudd Government – The First Year’.

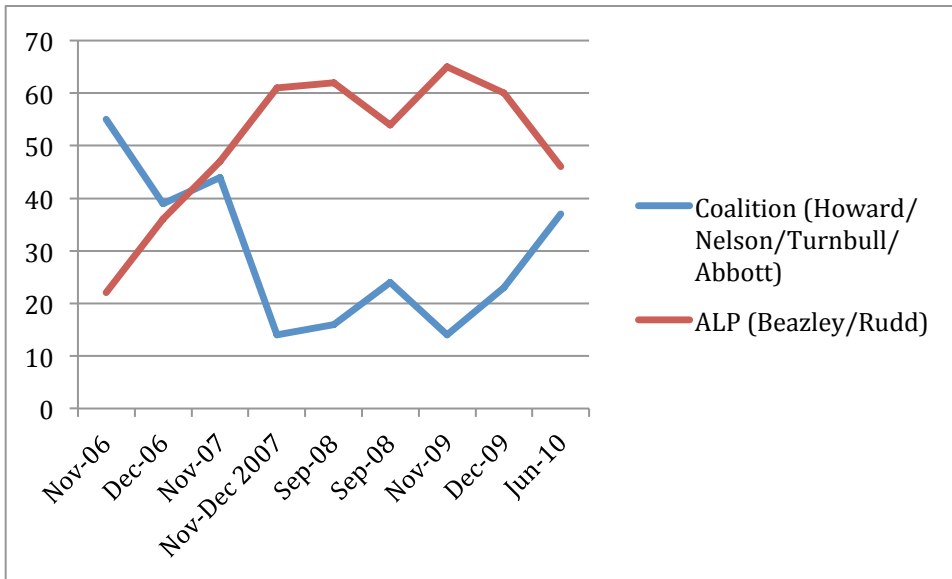
<sup>63</sup> Paris Aristotle, ‘Let’s Give “Softer” Approach for those Seeking Asylum a Chance’, *The Age*, 13 October 2008, <http://www.theage.com.au/opinion/lets-give-softer-approach-for-those-seeking-asylum-a-chance-20081012-4z3l.html>; accessed 13 October 2008.

<sup>64</sup> Paul Power, speech to the ALP National Conference Fringe Event, ‘Which Way Forward? Refugee, Security and the Asia-Pacific’, 31 July 2009, [http://www.refugeecouncil.org.au/docs/resources/0907\\_ALP\\_Fringe.pdf](http://www.refugeecouncil.org.au/docs/resources/0907_ALP_Fringe.pdf); accessed 1 March 2013.

<sup>65</sup> United Nations High Commissioner for Refugees, Antonio Guterres, at the 2008 meeting of the Executive Committee of the UNHCR, cited by Evans, ‘Refugee Policy Under the Rudd Government – The First Year’.

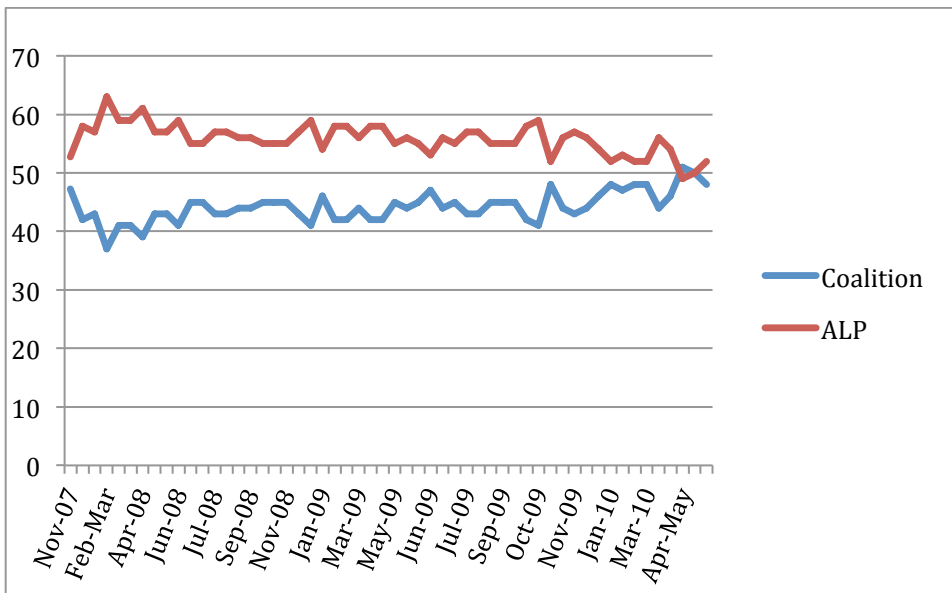
<sup>66</sup> Caroline Overington, ‘Indonesian Solution Inhumane: Refugee Advocates’, *The Australian*, 27 October 2009, <http://www.theaustralian.com.au/politics/indonesian-solution-inhumane-refugee-advocates/story-e6frgczf-1225791517819>; accessed 29 October 2009.





**Figure 4.2.2: Newpoll surveys - preferred Prime Minister**

Source: AAP, 'Kevin Rudd's Polling Since 2006', *Australian Financial Review*, 24 June 2010.



**Figure 4.2.3: Newpoll surveys - two party preferred**

Source: Graph compiled from Newpoll opinion polls for *The Australian* available at <http://www.newpoll.com.au/opinion-polls-2/opinion-polls-2/>.

### Same, same but different

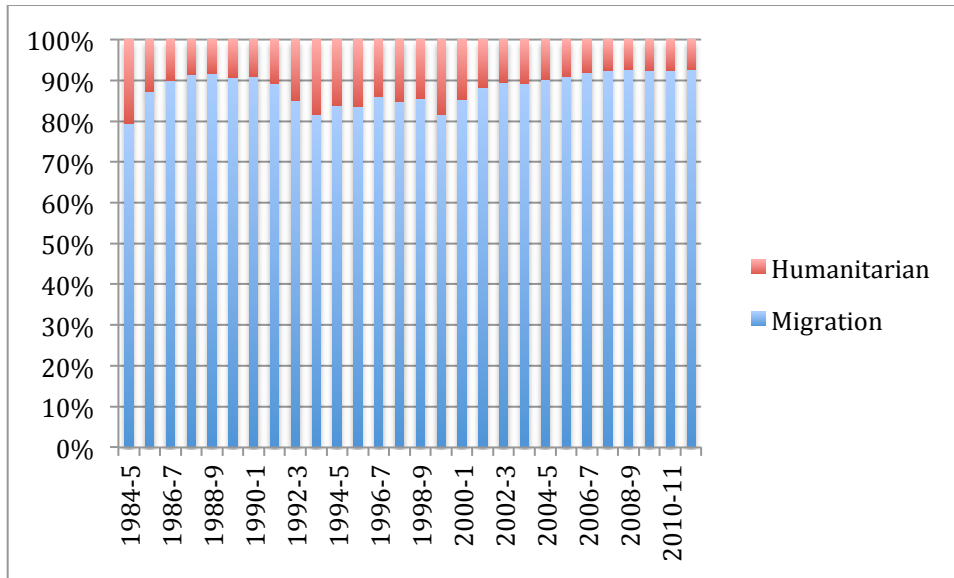
However, despite the fanfare, key elements of the previous Government's asylum policies remained. Insisting that "[s]trong border security and humane and risk-based detention policies [were] not incompatible",<sup>67</sup> the Rudd Government abolished or softened only those aspects of the policy that effectively punished asylum seekers after they arrived, such as detention debt and temporary protection visas, but did not significantly alter any of the policies that limited access to Australia's asylum system in the first place. The Government boasted that it "remain[ed] committed to strong border security, tough anti-people smuggling measures and the orderly processing of migration to our country".<sup>68</sup> It did not reverse the excision of outlying territory from Australia's migration zone and, in fact, opened new detention facilities (commissioned by the Howard Government) on the excised territory of Christmas Island for offshore (or off-mainland) processing, arguing that this would "signal that the Australian Government maintains a very strong anti people-smuggling stance".<sup>69</sup> And while it ended the Pacific Solution when it wound down processing on Nauru and Manus Island, the Government did not repeal section 198A of the *Migration Act*, which provided the statutory basis for 'offshore entry persons' to be taken to a declared country for processing. This was not an inconsequential oversight; it allowed for the reinstatement of offshore processing under the subsequent Gillard Government and its extension to indefinite offshore processing with no chance of resettlement in Australia – perhaps the most draconian policy innovation yet – under Rudd in his brief second term as Prime Minister in 2013. Certainly, the Rudd Government increased the legal avenues for resettlement in Australia by increasing the humanitarian intake modestly by 750 places; however, as Figure 4.2.4 shows, the humanitarian program nevertheless diminished as a proportion of the overall immigration intake, from an average of 12% during the Howard era to just 7% during Rudd's time in office.

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<sup>67</sup> Evans, 'New Directions in Detention'.

<sup>68</sup> Chris Evans, 'Sri Lankans Granted Humanitarian Entry', media release, 11 January 2008, <http://www.minister.immi.gov.au/media/media-releases/2008/ce08003.htm>; accessed 12 September 2008.

<sup>69</sup> Evans, 'New Directions in Detention'.



**Figure 4.2.4: Australia’s Humanitarian Program as a proportion of the overall Immigration Program**

Source: Janet Phillips, Michael Klapdor and Joanne Simon-Davies, ‘Migration to Australia Since Federation: A Guide to the Statistics’, background note, Parliament of Australia, Parliamentary Library, updated 29 October 2010, p. 13, <http://www.aph.gov.au/binaries/library/pubs/bn/sp/migrationpopulation.pdf>; accessed 23 July 2012.

The maintenance of the excision of territory and offshore processing was significant, as Paul Power notes, since it was a policy conceived in the immediate aftermath of September 11, a period of heightened fear and insecurity when it was suggested that there were possible links between asylum seeker movement and global terrorism, fears that have since proven false.<sup>70</sup> The continuation of these policies nonetheless implied that asylum seekers were a threat to be kept at a distance, out of sight and out of mind. A consequence of this was that those asylum seekers (who, as noted, were typically the most vulnerable and also the most likely to be found to be refugees) had fewer rights than those processed on the mainland. Although, under Evans’ direction, asylum seekers processed on Christmas Island were now provided access to legal assistance, review of negative asylum decisions and external scrutiny by the Immigration Ombudsman, the Government still discriminated against those processed offshore by denying them recourse to merits or judicial review via the Refugee Review

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<sup>70</sup> Power, ‘Which Way Forward?’.

Tribunal and the courts. To critics, it seemed like the new Government had merely replaced the Pacific Solution with the Indian Ocean Solution.<sup>71</sup>

Mandatory detention, although softened around the edges, was retained as “an essential component of strong border control” and the Government reaffirmed its commitment to the policy at every available opportunity.<sup>72</sup> It largely failed to deliver on its grand promises of “new directions” and values in immigration detention. The Migration Amendment (Immigration Detention Reform) Bill 2009, designed to embed Labor’s risk-based approach to detention in law, languished. As a surge of new boat arrivals that began in earnest in April 2009 (see Figures 4.2.5) and a fatal explosion aboard one of them, the result of suspected sabotage,<sup>73</sup> which eroded public sympathy for asylum seekers, rendered it too politically risky to pursue. The Bill subsequently lapsed in July 2010 when the House of Representatives was prorogued for the 2010 federal election. The Government’s commitment to using detention as a last resort and only for the shortest time possible thus proved to be aspirational only. Long-term detention continued,<sup>74</sup> indefinite detention remained possible and children remained in detention or “alternative places of detention” where their freedom was similarly restricted.<sup>75</sup> At the end of the Rudd Government’s first term in power, there were 674 children in immigration detention on the Australian mainland and Christmas Island.<sup>76</sup> In 2009, the UN Human Rights Committee again expressed concerns about the policy and

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<sup>71</sup> See, for example, Refugee and Immigration Legal Centre co-ordinator David Manne, cited in Paul Maley, ‘Pacific Solution Sinks Quietly’, *The Australian*, 9 February 2008, <http://www.theaustralian.news.com.au/story/0,25197,23183785-5013404,00.html>; accessed 21 September 2009.

<sup>72</sup> See Evans, ‘New Directions in Detention’, for details.

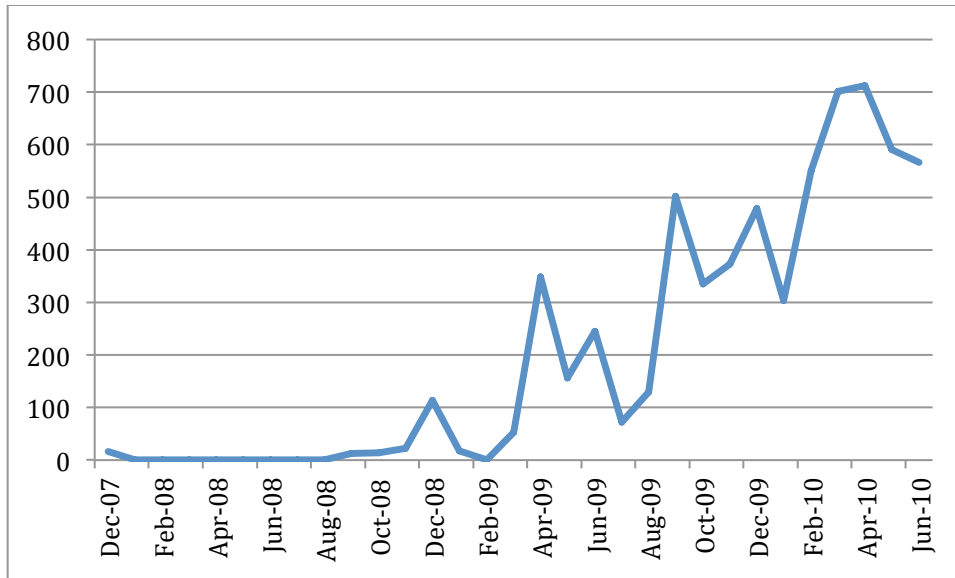
<sup>73</sup> This incident occurred at Ashmore Reef, 16 April 2009. Emma Rodgers, ‘Rudd Wants People Smugglers to “Rot in Hell”’, *ABC News*, 17 April 2009, <http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814>; accessed 17 April 2009.

<sup>74</sup> At the end of October 2011, 39% of detainees had been in detention for more than 12 months. Department of Immigration and Citizenship, ‘Immigration Detention Statistics Summary’, 31 October 2011, [http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20111031.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20111031.pdf); accessed 29 November 2011.

<sup>75</sup> As of 11 October 2010, there were 723 children in immigration detention in Australia and Christmas Island. See John Stewart, ‘Children Remain in Immigration Detention’, *Lateline*, ABC, 11 October 2010, <http://www.abc.net.au/lateline/content/2010/s3035511.htm>; accessed 11 October 2010.

<sup>76</sup> DIAC, Community and Detention Services Division, ‘Immigration Detention Statistics Summary’, 30 July 2010, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics/>; accessed 31 March 2015.

recommended that the Australian Government “consider abolishing the remaining elements of its mandatory immigration detention policy” and “closing down the Christmas Island detention centre”.<sup>77</sup> Indeed, housing asylum seekers in the community while their claims were heard may have helped ease the crisis caused by an increase in boat arrivals in 2009 (see Figure 4.2.5). But instead, the Rudd Government simply expanded detention facilities to accommodate more detainees, devoting \$202 million over 5 years in the 2010-11 budget.<sup>78</sup>



**Figure 4.2.5: Irregular maritime arrivals per month during the first Rudd Government (December 2007 – June 2010 inclusive)**

Source: Extracted from DIAC data supplied to Marg Hutton by Cath Wilson, Assistant Secretary, Immigration Intelligence Branch, November 2011, <http://sievx.com/dbs/boats/SIEVS1to374.pdf>; accessed 27 January 2015.

The abolition of detention debt was significant, but its consequence was overstated. In reality, the collection of debts was rarely enforced, even during the Howard era, and what was collected cost more to recover than the revenue it generated; it was, therefore, as the

<sup>77</sup> United Nations Human Rights Committee, 95<sup>th</sup> session, New York, 16 March-3 April 2009, ‘Consideration of Reports Submitted by States Parties under Article 40 of the Covenant - Concluding Observations of the Human Rights Committee, Australia’, UN Doc. CCPR/C/AUS/CO/5 (2009), <http://www1.umn.edu/humanrts/hrcommittee/australia2009.html>; accessed 16 April 2013.

<sup>78</sup> Budget Review 2010-11, cited in Janet Philips and Harriet Spinks, ‘Immigration Detention in Australia’, Department of Parliamentary Services, Social Policy Section, Parliament of Australia, 23 January 2012, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2011-2012/Detention](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/Detention); accessed 15 May 2012.

Liberal Senator Judith Troeth suggested, merely “a blot on our statute book”.<sup>79</sup> Likewise, the closure of Nauru in February 2008, which marked the end of the Pacific Solution, was largely symbolic since, by that time, there were few detainees left on the island and few new arrivals. And as noted, offshore processing, for all effects and purposes, continued; it was simply shifted to excised Australian territory rather than outsourced to Pacific neighbours. The futility of this arrangement did not go unnoticed. As Robert Manne pointed out, as had been the case with the Pacific Solution,

If asylum seekers reach Christmas Island and are found to be refugees, Australia will have no alternative but to settle them. It is inconceivable that other countries will offer homes to refugees already on Australian territory. The hope of the government is, however, that because of the success of the Howard government’s brutal deterrence policy, people smugglers will continue to give Australia a wide berth.”<sup>80</sup>

The Government’s “tough but humane” approach to border control and asylum seekers was canny, in that it allowed the Government to swing whichever way public opinion was blowing, but, for this very reason, it had no lasting effect on the political narrative. Rudd used his determination to stamp out “the world’s most evil trade” to justify the maintenance of a “hardline, tough, targeted approach to maintaining border protection for Australia”, dedicating “more resources to combat people smuggling than any other government in Australian history”.<sup>81</sup> The irony of Rudd’s veneration of Bonhoeffer, whose admirable feats included smuggling German Jews across the border to Switzerland in the 1940s, in the context of his unequivocal loathing of contemporary people smugglers, did not go unnoticed.<sup>82</sup> As Chris Bisset noted, Rudd’s categorisation of people smugglers as the “scum

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<sup>79</sup> Liberal Senator Judith Troeth, *CPD*, Senate, 8 September 2009, p. 5887.

<sup>80</sup> Robert Manne, ‘What is Rudd’s Agenda?’, *The Monthly*, November 2008, pp. 22-32.

<sup>81</sup> Kevin Rudd quoted in CNN, ‘Rudd: Human Smugglers “Scum of the Earth”’, *CNN International/Asia*, 18 April 2009, <http://edition.cnn.com/2009/WORLD/asiapcf/04/17/rudd.refugees/index.html>; accessed 30 August 2009.

<sup>82</sup> See, for example, Guy Rundle, ‘Rudd’s Hero was a People Smuggler’, *Crikey*, 23 April 2009; Michael Epis, ‘Rudd’s Hero, the People Smuggler’, *Sydney Morning Herald*, 20 October 2009; Chris Bisset, ‘In Defence of People Smugglers’, *Eureka Street*, 15 October 2009, <http://www.eurekastreet.com.au/article.aspx?aeid=17090>; accessed 5 March 2013.

of the earth” was, at least, “a more considered view than that of the Howard Government which classed them as facilitators of evil queue jumping by people prepared to throw their children overboard to gain entry into the lucky country”.<sup>83</sup> But, in effect, the vilification of people smugglers merely served as a proxy for the vilification of asylum seekers, who continued to be punished by policies ostensibly targeting people smugglers. The end game remained the same: to stop the boats. Rudd’s “tough but humane” slogan thus proved to be little more than a riff on the Howard Government’s approach. Ultimately, the Government’s promise to take a more compassionate, principled approach to asylum policy was only realised when it was not relevant – that is, while asylum seekers were an abstract rather than real issue.

This became more apparent as the number of unauthorised boat arrivals increased in 2009, providing the first real test of the effectiveness of Labor’s humanitarian rhetoric and its commitment to strong border control. After just 148 unauthorised maritime arrivals/IMAs in 2007 and 161 in 2008, this figure jumped to nearly 3,000 in 2009 and showed no signs of abating. As the flow of boats increased, so too did public disquiet. A Lowy Institute poll in early October 2009 revealed that 76% of Australians were ‘somewhat’ (33%) or ‘very’ (43%) concerned about unauthorised arrivals.<sup>84</sup> The situation came to a head in October as Christmas Island swelled beyond capacity and the Government contemplated transferring detainees to the mainland for processing, despite having pledged to keep asylum seekers offshore during the 2007 election. The Opposition suggested that the renewed flow of asylum seekers arriving in boats was a direct result of the ‘softening’ of asylum policy under Rudd. It relished being able to recycle the taunt of Julia Gillard during her stint as Shadow Minister for Immigration during the Howard era, “another boat on the way, another policy failure”,<sup>85</sup> against the Government. The Former Foreign Minister under Howard, Alexander

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<sup>83</sup> Bisset, ‘In Defence of People Smugglers’.

<sup>84</sup> Fergus Hanson, ‘The Lowy Institute Poll 2009 - Australia and the World: Public Opinion and Foreign Policy’, Lowy Institute for International Policy, October 2009, [https://www.lowyinstitute.org/sites/default/files/pubfiles/Lowy\\_Poll\\_09\\_1.pdf](https://www.lowyinstitute.org/sites/default/files/pubfiles/Lowy_Poll_09_1.pdf); accessed 17 February 2017.

<sup>85</sup> Julia Gillard, Shadow Minister for Health, ‘Another Boat on the Way. Another Policy Failure’, press statement, 23 April 2003, cited in Laurie Oakes, ‘Which Shadow Minister Plays Politics with Boatpeople’, *The Australia*, 20 October 2009, <http://www.theaustralian.com.au/news/which-shadow-minister-plays-politics-with-boatpeople/story-e6frg71f-1225788507350>; accessed 2 February 2012; Scott Morrison, Shadow Minister for Immigration, ‘100 Boat Arrivals 100 Policy Failures’, 30 March 2010;

Downer, accused Rudd of having undone “[a]ll the hard work by the Howard Government” and suggested that all the Government was doing was “encouraging more people to embark on the perilous journey by small boat to Australia in defiance of our laws”.<sup>86</sup> Opposition leader Malcolm Turnbull coined the phrase, “rolling out the Rudd carpet” for asylum seekers<sup>87</sup> and called for the reintroduction of temporary protection visas, re-branded as non-permanent visas (NPV), for all boat arrivals as a deterrent. These non-permanent visas would be reviewed within three years with a view to returning those deemed to be no longer in need of protection back to their country of origin. Former Immigration Minister Philip Ruddock suggested that Rudd had opened “a pipeline of 10,000 [asylum seekers] a year or more”<sup>88</sup> while other Liberal figures suggested the boats might be harbouring terrorists, diseases and criminals, heightening the threat rhetoric.<sup>89</sup>

### Rudd’s Indonesian Solution

A year earlier, while proudly citing all of the Rudd Government’s improvements to refugee and asylum policy in an address to the Refugee Council of Australia, Immigration Minister Chris Evans had pointed out that “however comprehensive the protection and border security arrangements we have in place, we will still see people coming to this country unauthorised, either by boat or by plane. We did under the last government and we will under this one. What is important”, he argued, “is how we respond”.<sup>90</sup> He suggested that his

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<http://pandora.nla.gov.au/pan/22107/20100820-0218/www.liberal.org.au/Latest-News/2010/03/30/100-Boat-Arrivals-100-Policy-Failures.html>; accessed 2 February 2012.

<sup>86</sup> Alexander Downer, ‘On the Road Again’, *The Advertiser*, 22 March 2010, p. 25.

<sup>87</sup> Lanai Vasek, ‘Rudd Attacks Turnbull’s “Dot Points” on Border Protection’, *The Australian*, 13 November 2009, <http://www.theaustralian.com.au/politics/rudd-attacks-turnbulls-dot-points-on-border-protection/story-e6frgczf-1225797330018>; accessed 13 November 2009.

<sup>88</sup> Philip Ruddock quoted in Paul Maley and Amanda O’Brien, ‘Philip Ruddock Predicts Flood of 10,000 Boatpeople’, *The Australian*, 13 October 2009, <http://www.theaustralian.com.au/national-affairs/defence/philip-ruddock-predicts-flood-of-10000-boatpeople/story-e6frg8yx-1225786083195>; accessed 13 October 2009.

<sup>89</sup> See AAP, ‘Tuckey Warns of Terrorists Among Asylum-Seekers’, *The Australian*, 22 October 2009. See also remarks by Western Australia Liberal Premier Colin Barnett and Federal Opposition defence spokesperson, Liberal Senator David Johnston quoted in Michelle Grattan and Lindsay Murdoch, ‘Chaos as Jakarta Diverts Asylum Boat’, *The Age*, 23 October 2009. Barnett supported Tuckey’s claim suggesting there was “a risk about criminal elements” entering Australia as asylum seekers, while Johnston suggested that asylum seekers would bring diseases such as foot and mouth disease, typhoid and tuberculosis.

<sup>90</sup> Evans, ‘Refugee Policy Under the Rudd Government – The First Year’.



Government's response would be "calm and measured".<sup>91</sup> In fact, the Government's response to this new boat 'crisis' was as reactive and harried as that of its predecessor in 2001 and ultimately less successful in achieving its aims.

When the Government received warning of a boat of 255 Sri Lankan asylum seekers headed to Australia in early October, Rudd negotiated directly with the Indonesian President Susilo Bambang Yudhoyono for Indonesian authorities to intercept the boat and detain its passengers. The boat was taken to Merak where its passengers, including 31 children, refused to disembark. Instead, they embarked on a hunger strike, which, thanks to some media-savvy and articulate spokespeople, garnered the attention of the international media. Australian authorities reportedly requested that Indonesia prevent journalists from accessing the ship, to which the director of diplomatic security, Dr Sujatmiko, indignantly replied, "We have a democratic view of how the press works ... What's more, this is my country, not yours."<sup>92</sup> The media took full advantage of this unprecedented access to a group of people usually represented by long shots of boats and impersonal, dispassionate accounts of their plight. The asylum seekers were named and photographed up close by the media and returned the favour with eloquent and emotional sound bites that, as Sophie Black observed, made them seem just like us, only in a more desperate situation:

If you had no place, if you had no country of your own, what would you do?  
And how long would you stay in a boat before you were able to enter a country  
that will give you asylum? We are not animals. We are not dogs. We are not stray  
dogs. We are people without a country to live in.<sup>93</sup>

They spoke of their professions as accountants, carpenters and information technology experts, which helped to support their claim that they were not economic migrants but rather

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<sup>91</sup> *Ibid.*

<sup>92</sup> Stephen Fitzpatrick, 'Jakarta Fearful of Asylum-Seeker Fallout', *The Australian*, 7 November 2009, <http://www.theaustralian.com.au/news/nation/jakarta-fearful-of-the-fallout-from-sri-lankan-asylum-seeker-issue/story-e6frg6nf-1225795200874>; accessed 7 November 2009.

<sup>93</sup> One of the spokespeople for the group of asylum seekers, 'Alex', quoted in Sophie Black, 'Meet Alex and Brindha: A Media Savvy Bunch of Boat People', *Crikey*, 16 October 2009.

a persecuted minority.<sup>94</sup> More than 100 had already been recognised by UNHCR as refugees. With their measured yet desperate pleas to the Australian Government to come to their aid, the Merak asylum seekers turned attention unfavourably to Australia's policies.

Less than a week later, with the Merak situation still unresolved, the Australian Navy responded to a distress call from another group of 78 Sri Lankan asylum seekers in international waters within Indonesia's search and rescue zone.<sup>95</sup> The asylum seekers were ethnic Tamils, most of whom had been recognised by the UN office in Jakarta as refugees but, their resettlement prospects remaining bleak, had taken matters into their own hands and hired a people smuggler to take them to Australia. They were subsequently transferred to an Australian Customs vessel, the *Oceanic Viking*, where they remained while the Australian and Indonesian governments debated whose responsibility they were. Although Indonesia was the lead search and rescue authority for the area where they were found, it was an Australian ship that responded to the call and now harboured the asylum seekers. As a signatory to the Refugee Convention, Australia had its *non-refoulement* obligations to consider. However, sweltering under the hot gaze of the media due to the Merak stand-off and facing building domestic pressure about the growing numbers of irregular maritime arrivals, the Australian Government was desperate for Indonesia to accept responsibility for the group.

At the time of these events, Rudd was enjoying what was described as "totalitarian-like"<sup>96</sup> approval ratings, reaching a high of 71% in an *Age*/Nielson poll in early October 2009.<sup>97</sup> Such popularity is a rare privilege that provides leaders an opportunity to eschew populist

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<sup>94</sup> See Tom Allard, 'Boat People Shun Fluids in Stand-Off', *The Age*, 17 October 2009, <http://www.theage.com.au/national/boat-people-shun-fluids-in-standoff-20091016-h17s.html>; accessed 17 October 2009.

<sup>95</sup> The asylum seekers were transferred to the customs vessel because of steering and navigation problems. However later reports suggested the asylum seekers' boat had been deliberately sabotaged. See Nick Butterfly, Andrew Probyn and Lindsay Murdoch, 'Asylum Boat had Holes Drilled in Hull', *The Age*, 23 October 2009, <http://www.theage.com.au/national/asylum-boat-had-holes-drilled-in-hull-20091022-h9aw.html>; accessed 23 October 2009.

<sup>96</sup> Fergus Hanson, 'Who's the Fairest of them All?', *The Interpreter*, Lowy Institute for International Policy, 19 October 2009, <http://www.lowyinterpreter.org/post/2009/10/19/Who-is-the-fairest-of-them-all.aspx>; accessed 20 October 2009.

<sup>97</sup> Michelle Grattan, 'Turnbull's Joe Blow: Hockey the Front Runner', *The Age*, 12 October 2009, <http://www.theage.com.au/national/turnbulls-joe-blow-hockey-the-front-runner-20091011-gsex.html>; accessed 12 October 2009.

policies in favour of principled politics, something Rudd had spoken of with great conviction before becoming leader. In an interview with Geraldine Doogue in 2005, for example, he had spoken fervently of “our responsibility to our fellow man through the agency of the state” and of the importance of staying true to one’s own conscience.<sup>98</sup> He acknowledged the dilemma sometimes posed by conflict of “[q]uestions of conscience as opposed to the inherent compromise of the political process”<sup>99</sup> but defended his view that “any person in the public political process must first and foremost answer to their conscience”.<sup>100</sup> In terms of asylum policy, this was easy while boat numbers were low and the public was onside. However, as numbers rose and the public mood shifted, so too did Rudd’s convictions. Perhaps sensing his own *Tampa* opportunity and hoping to consolidate his leadership before the 2010 election in the way Howard had in 2001,<sup>101</sup> or, alternatively, fearing an issue on which the Opposition had demonstrated it could make good capital, Rudd instead adopted a “hard line” stance against the asylum seekers’ demands, for which, he declared, his Government would “make no apology”.<sup>102</sup> After a face-to-face meeting, Rudd was able to persuade his Indonesian counterpart, President Susilo Bambang Yudhoyono, to temporarily accept the *Oceanic Viking* passengers for processing, a concession Yudhoyono ostensibly made on humanitarian grounds on account of a sick child on board the vessel.<sup>103</sup> Rudd also hastily brokered an agreement to deal with future arrivals, whereby Australia would provide additional funding to Indonesia to intercept, detain and effectively warehouse asylum seekers for processing. Australia would help to intercept asylum seekers but would hold no

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<sup>98</sup> Kevin Rudd, Shadow Minister for Foreign Affairs, interviewed by Geraldine Doogue, ‘Kevin Rudd: The God Factor’, *Compass*, 8 May 2005, <http://www.abc.net.au/compass/s1362997.htm>; accessed 14 February 2013.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> In 2001, Howard’s approval rating rose 11 points to 57%. See Michelle Grattan, ‘Nation Split on Rudd’s Asylum-Seeker Stance’, *The Age*, 9 November 2009, <http://www.theage.com.au/national/nation-split-on-rudds-asylumseeker-stance-20091108-i3in.html>; accessed 9 November 2009.

<sup>102</sup> Kevin Rudd, Anthony Albanese, Mike Rann and Patrick Conlan, joint press conference, Adelaide, 15 October 2009, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22PRIME%20MINISTER%22%20Author\\_Phrase%3A%22rann,%20mike%22;rec=2](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22PRIME%20MINISTER%22%20Author_Phrase%3A%22rann,%20mike%22;rec=2); accessed 16 January 2012.

<sup>103</sup> See Minister for Foreign Affairs Stephen Smith, interview with Tony Jones, *Lateline*, ABC, 20 October 2009, [http://pandora.nla.gov.au/pan/121016/20100726-0916/www.foreignminister.gov.au/transcripts/2009/091020\\_lateline.html](http://pandora.nla.gov.au/pan/121016/20100726-0916/www.foreignminister.gov.au/transcripts/2009/091020_lateline.html); accessed 28 March 2013. Also see Ben Doherty, Lindsay Murdoch and Karuni Rompies, ‘Asylum Seeker Pact Starts a New Deal’, *Sydney Morning Herald*, 21 October 2009.

responsibility for their treatment in Indonesia, a non-signatory of the Refugee Convention, or their resettlement.<sup>104</sup> This Indonesian solution was not new – Australia had long been funding Indonesian interference, interception and detention of asylum seekers and people smugglers<sup>105</sup> – but these incidents drew new attention to this arrangement and Rudd’s now desperate reliance on it. Despite the fact that many of the Tamils had already been recognised by UNHCR as refugees, Rudd implied that they were illegal migrants, perhaps to justify his hardened stance against a group he’d otherwise promised to act compassionately towards.<sup>106</sup> With his ‘Indonesian Solution’, Rudd, like Howard before him, was determined to show that his Government and no one else would decide who could come to this country and how they could arrive.

While this arrangement certainly fit the bill for “a tough, hardline approach to people smuggling”, it failed as “a fair and humane approach when it comes to the processing of asylum seekers”.<sup>107</sup> It failed to acknowledge or address the push factors driving forced migration or onward migration (i.e. from third countries such as Indonesia to resettlement countries such as Australia). In 2009, there were more than 2,000 asylum seekers and refugees registered with UNHCR in Indonesia, where they lacked work rights and access to education, lived in appalling conditions, and faced physical abuse in Indonesian detention centres, compounds and prisons.<sup>108</sup> Since Indonesia makes clear that local integration is not

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<sup>104</sup> See Marina Kamenev, ‘Asylum Seekers Stuck in Indonesia-Australia Standoff’, *Time*, 2 November 2009, <http://www.time.com/time/world/article/0,8599,1933874,00.html>; accessed 2 November 2009.

<sup>105</sup> A Regional Cooperation Model (RCM) between Australia, Indonesia and the International Organisation for Migration (IOM) was established in 2000, an initiative of the Howard Government. Savitri Taylor calculated that Australia paid a total of \$27.9 million between July 2000 and January 2008 to fund the IOM’s role in the RCM. This is in addition to its funding of UNHCR in Indonesia (\$702,000 in 2007-8) and funding supplied to the Indonesian Government to improve migration management and border security in Indonesia at a cost of approximately \$18 million each year. See Savitri Taylor, ‘Offshore Borders and Accountability’, *Australian Policy Online*, 18 November 2008, <http://apo.org.au/commentary/offshore-borders-and-accountability>; accessed 29 March 2013. Also see Sophie Black, ‘Australia’s \$18m Bid to Keep Asylum Seekers in Indonesia’, *Crikey*, 24 April 2009, [http://www.crikey.com.au/2009/04/24/australias-18m-bid-to-keep-asylum-seekers-in-indonesia/?wpmw\\_switcher=mobile](http://www.crikey.com.au/2009/04/24/australias-18m-bid-to-keep-asylum-seekers-in-indonesia/?wpmw_switcher=mobile); accessed 30 April 2009.

<sup>106</sup> Kevin Rudd, interview with Kerry O’Brien, *7:30 Report*, 22 October 2009, <http://pandora.nla.gov.au/pan/79983/20091030-1529/www.pm.gov.au/node/6269.html>; accessed 17 January 2013.

<sup>107</sup> *Ibid.*

<sup>108</sup> 2,107 people were registered with UNHCR in Indonesia as of 26 October 2009. See Jessie Taylor, ‘Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia’, 3 November 2009, <http://www.law.monash.edu.au/castancentre/news/behind-australian-doors-report.pdf>; accessed 3 June 2012,

an option, and asylum seekers in Indonesia have no legal status, the only hope for a durable solution for refugees within its territory lies with the possibility of changed circumstances in their home country that might allow for their return or third country resettlement. Under-resourced and overwhelmed, UNHCR processing in Indonesia is a protracted process that typically takes years and offers little hope of resettlement at the end of the process. Resettlement figures from Indonesia to Australia, the closest country of resettlement and, as it is wont to boast, one of the most generous in the world, averaged just 46 refugees per year between 2005 and 2008.<sup>109</sup> At that rate, a refugee in Indonesia might wait 40 years to be resettled in Australia. In the meantime, as Taylor points out, this

means that children are deprived of effective access to education and adults are deprived of the meaning given to life by gainful employment. Many live with the stress of separation from family members left behind, while those who brought families with them to Indonesia see their children grow to adulthood without any prospect of a safe and productive future. Depression is pervasive among adults and children and so too are psycho-physiological illnesses. It is not surprising, therefore, that even recognised refugees have made (or attempted to make) their way to Australia by boat.<sup>110</sup>

Rudd's 'solution' did not include an overall increase in the humanitarian quota nor a commitment to increase resettlement from Indonesia, suggesting Australia was, as it always had been, more concerned about keeping boats away from its shores than from offering people alternatives to risky boat voyages. But unlike Howard's Pacific Solution, under which asylum seekers remained Australia's responsibility, the agreement with Indonesia meant that the Rudd Government effectively handed over all responsibility for the welfare of asylum

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p. 5. Taylor and Rafferty-Brown suggest there were 2,567 individuals registered with UNHCR in Indonesia by the end of 2009, comprising 1,769 asylum seekers and 798 recognised refugees. See Savitri Taylor and Bryanna Rafferty-Brown, 'Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution', *International Journal of Refugee Law*, vol. 22, no. 4, 2010, p. 562.

<sup>109</sup> Australia resettled just 33 refugees from Indonesia in 2005, 30 in 2006, 86 in 2007, 35 in 2008 and 29 by the end of October 2009. See Taylor and Rafferty-Brown, 'Waiting for Life to Begin', p. 585.

<sup>110</sup> Savitri Taylor, 'Seeking an Alternative to a Life in Limbo', *Inside Story*, 22 April 2009, <http://inside.org.au/seeking-an-alternative/>; accessed 30 April 2009.

seekers to a country that was a non-signatory of the Refugee Convention with a poor record of refugee protection.

The asylum seekers were taken to Bintan Island in the Indonesian archipelago to be processed at an Australian-funded detention centre in Tanjung Pinang. However, determined not to be returned to a life of limbo in Indonesia, like their compatriots in Merak, they refused to leave the boat, instead insisting on being taken to Australia to have their asylum claims processed. Meanwhile, the Governor of the Riau Islands initially refused to allow the *Oceanic Viking* passengers to disembark, declaring, “We are not a dumping ground for other countries.”<sup>111</sup> The customs vessel was eventually given a temporary security clearance but was required to depart Indonesian territory by 6 November – with or without its passengers. Australia was forced to send in negotiators to encourage the asylum seekers to disembark, a move that undermined Rudd’s message: we will decide. The *Oceanic Viking* stalemate ended a month after it began when the asylum seekers were promised accelerated processing and resettlement in Australia – within a month for the 37 people already with UN refugee papers and within 12 weeks for others found to be refugees.

While Rudd insisted that “the group [was] being treated in a manner consistent with that afforded to any other asylum seeker in Indonesia”,<sup>112</sup> the Merak asylum seekers soon found this was not the case. Observing the resolution of the *Oceanic Viking* situation, their spokesperson Alex promised, “If we get the same deal, we will co-operate sooner than them.”<sup>113</sup> However, the *Oceanic Viking* compromise proved politically costly for Rudd and saw the Government firm its resolve against the Merak asylum seekers and other unauthorised boat arrivals. Their six-month stand-off only ended when the remaining asylum

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<sup>111</sup> Governor of the Riau Islands, Ismeth Abdullah, quoted in Paul Kelly, ‘Rudd’s Softer Stance Mugged by Reality’, *The Australian*, 17 October 2009 <http://www.theaustralian.news.com.au/story/0,25197,26220271-12250,00.html>; accessed 20 October 2009.

<sup>112</sup> Quoted in Ben Doherty, ‘Oceanic Viking Breakthrough: Asylum Seekers to Come Ashore’, *The Age*, 17 November 2009, <http://www.theage.com.au/world/oceanic-viking-breakthrough-asylum-seekers-to-come-ashore-20091117-ijly.html>; accessed 18 November 2009.

<sup>113</sup> ‘Alex’, spokesperson for the Merak asylum seekers, quoted in Tom Allard and Ben Doherty, ‘Indonesia Backs Down on Merak Boat People’, *Sydney Morning Herald*, 19 November 2009, <http://www.smh.com.au/world/indonesia-backs-down-on-merak-boat-people-20091118-implw.html>; accessed 19 November 2009.

seekers were removed from the boat by Indonesian authorities in April 2010 and taken to the detention centre at Tanjung Pinang with a commitment from UNHCR to begin processing within 24 hours and complete it within two months.<sup>114</sup> Indonesian officials reportedly promised the asylum seekers resettlement in either Australia or Canada within 12 months.<sup>115</sup> However, no such deal existed and the Merak asylum seekers instead found themselves at the back of a very long queue.

The *Oceanic Viking* incident tested relations with Indonesia. Talk of an ‘Indonesian Solution’ to Australia’s boat problem made Indonesia uncomfortable. According to a spokesperson for the Indonesian Department of Foreign Affairs (Deplu), Teuku Faizasyah, “Indonesia has not considered [the possibility], and has never wanted its territory to become a processing place for the transferring of potential refugees to a third country”.<sup>116</sup> Faizasyah emphasized that the decision to allow the *Oceanic Viking* to temporarily enter Indonesian territory was made for humanitarian reasons (i.e. rather than as part of an ongoing “solution”),<sup>117</sup> while the director of diplomatic security declared that the *Oceanic Viking* would be “the first and the last” and made it clear that the Indonesians “did not enjoy this sort of incident”.<sup>118</sup> Additionally, he suggested that Indonesia had been “more than patient” and warned that the issue could damage the relationship between the two countries.<sup>119</sup>

As well as undermining the ‘Indonesian solution’ supposedly brokered following the interception of the Merak asylum seekers, the *Oceanic Viking* debacle was domestically toxic for Rudd. Whereas the *Tampa* saga had seen Howard’s approval rating rise 11 points to 57%,

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<sup>114</sup> Adam Gartrell and Heru Rahadi, ‘Indonesia Ends Asylum Seeker Stand-Off’, *The Age*, 19 April 2010, <http://news.theage.com.au/breaking-news-world/indonesia-ends-asylum-seeker-standoff-20100419-sohh.html>; accessed 19 April 2010.

<sup>115</sup> See Tom Allard, ‘Refugee Standoff Ends in Tears and Entreaties’, *The Age*, 20 April 2010.

<sup>116</sup> See ‘Department of Foreign Affairs Emphasises that Indonesia is not a Transit Place for Refugees or Illegal Immigrants’, *Batam Today*, 2 November 2009, <http://www.safecom.org.au/stuckinmerak.htm#batam>; accessed 19 March 2013.

<sup>117</sup> *Ibid.*

<sup>118</sup> Tom Allard and Ben Doherty, ‘Indonesia Backs Down on Merak Boat People’, *Sydney Morning Herald*, 19 November 2009, <http://www.smh.com.au/world/indonesia-backs-down-on-merak-boat-people-20091118-implw.html>; accessed 19 November 2009.

<sup>119</sup> Director for diplomatic security Dr Sujatmiko quoted in Fitzpatrick, ‘Jakarta Fearful of Asylum-Seeker Fallout’.

Rudd's approval rating dropped 10 points to 56% by the time the *Oceanic Viking* standoff was resolved.<sup>120</sup> Most felt that the Government's stand was not hard enough. According to an Essential Research poll in early November 2009, 52% of people (including 42% of Labor voters) thought the way the Government had handled the asylum seeker issue had been too weak. A further 28% felt the Government had taken about the right approach while only 9% thought it had been too tough.<sup>121</sup> An *Age*/Nielsen poll yielded similar results – 44% felt the Government's policies were too soft, 32% felt they were about right and only 13% felt they were too harsh – and revealed that Labor voters were twice as likely to rate its policies too soft as too harsh.<sup>122</sup>

Rudd's political fate took a turn for the worse when Tony Abbott was elected leader of the Opposition on 1 December 2009 and immediately called a secret ballot to repeal the Coalition's support for the emissions trading scheme, the Labor Government's principal measure for addressing climate change, which Rudd had famously identified as "the greatest moral, economic and social challenge of our time".<sup>123</sup> Despite his best efforts later that month at the Copenhagen climate change summit, he failed to return home with a binding agreement to take action to reduce global emissions. Marr points to Copenhagen as the beginning of the end for Rudd:

Rudd's bond with the people began to fray after Copenhagen. ... after this debacle the mood shifted. Malcolm Turnbull had fallen. His place as leader of the

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<sup>120</sup> Essential Research polls showed a drop of 10 points from September (i.e. prior to the arrival of both the *Merak* and *Oceanic Viking* asylum seekers) to the end of November 2009. See Essential Research, *Essential Report*, 14 December 2009, [http://blogs.crikey.com.au/pollbludger/files/2009/12/Essential-Report\\_141209.pdf](http://blogs.crikey.com.au/pollbludger/files/2009/12/Essential-Report_141209.pdf); accessed 13 March 2013. Newspan surveys revealed a similar drop in Rudd's satisfaction ratings of 11 points from the end of September/start of October 2009 (67%) to mid- and late November (56% respectively). See Newspan for *The Australian*, 9 November 2009, [http://polling.newspan.com.au/image\\_uploads/091109%20Federal%20Voting%20Intention%20&%20Leader%20Ratings%20+%20CPRS%20+%20Best%20Leader.pdf](http://polling.newspan.com.au/image_uploads/091109%20Federal%20Voting%20Intention%20&%20Leader%20Ratings%20+%20CPRS%20+%20Best%20Leader.pdf); accessed 16 March 2013.

<sup>121</sup> See Essential Research, 'Federal Government Handling of Asylum Seekers', *Essential Report*, 9 November 2009; <http://www.essentialvision.com.au/federal-government-handling-of-asylum-seekers>; accessed 13 March 2013.

<sup>122</sup> See Michelle Grattan, 'Nation Split on Rudd's Asylum-Seeker Stance', *The Age*, 9 November 2009, <http://www.theage.com.au/national/nation-split-on-rudds-asylumseeker-stance-20091108-i3in.html>; accessed 9 November 2009.

<sup>123</sup> Kevin Rudd, 'Building a Better World Together', speech at Kyoto University, 9 June 2008, [http://www.pm.gov.au/media/speech/2008/speech\\_0294.cfm](http://www.pm.gov.au/media/speech/2008/speech_0294.cfm); accessed 10 September 2008.



Opposition was taken by a Tory head-kicker unembarrassed to embrace the denialists' cause. The old consensus on climate change, which Rudd had identified himself with so closely, began to melt away. ... His leadership was in question. Rudd had sold himself to the Australian people as a new kind of leader: a man of intellect and values out to reshape the future. If he isn't that, people are asking, what is he? And who is he?<sup>124</sup>

Rather than calling a double dissolution election on the issue, Rudd announced the postponement of the emissions trading scheme in April 2010, precipitating a sharp drop in his approval ratings to just 41% by the end of May, his lowest since becoming Prime Minister, coupled with a 47% disapproval rating (see Figure 2.4.6 on the following page). His low approval ratings reflected changing public perceptions of Rudd as a capable leader (72% in June 2009 to 55% in May 2010), good in a crisis (60% in June 2009 to 44% in May 2010) and trustworthy (51% in December 2009 to 41% by May 2010).<sup>125</sup> The ALP's two party preferred results also dipped below 50% for the first time (refer to Figure 4.2.3).<sup>126</sup> It was a spectacular fall from grace after Rudd's long, high ride in the polls since becoming Prime Minister.

His leadership woes were compounded by ever-growing numbers of boat arrivals, particularly in the context of Abbott's ascension to the Opposition leadership. Robert Manne suggests that "[w]hile Malcolm Turnbull was leader of the Opposition, the asylum seeker issue was a headache for the Rudd Government. Under Tony Abbott, an entirely unscrupulous populist conservative, it became a nightmare."<sup>127</sup> Abbott understood well what veteran political commentator Paul Kelly calls "an iron law of Australian politics", namely,

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<sup>124</sup> David Marr, 'Power Trip: The Political Journey of Kevin Rudd', *Quarterly Essay*, vol. 38, 2010, p. 4.

<sup>125</sup> See Bunn, 'Essential: The Polling Slide that Evicted Rudd from the Lodge'.

<sup>126</sup> AAP, 'Kevin Rudd's Polling Since 2006', *The Australian*, 24 June 2010, [http://www.afr.com/p/national/politics/kevin\\_rudd\\_polling\\_since\\_HrYcqGKRWwz8IiuTQDP2JK](http://www.afr.com/p/national/politics/kevin_rudd_polling_since_HrYcqGKRWwz8IiuTQDP2JK); accessed 24 June 2010; Newspan for *The Australian*, 21 June 2010, [http://polling.newspan.com.au/image\\_uploads/100605%20Federal%20Voting%20Intention%20&%20Leader%20Ratings.pdf](http://polling.newspan.com.au/image_uploads/100605%20Federal%20Voting%20Intention%20&%20Leader%20Ratings.pdf); accessed 30 March 2013.

<sup>127</sup> Robert Manne, 'The Moral Dilemma of Asylum Seeker Policy', *ABC Religion and Ethics*, 9 November 2010, <http://www.abc.net.au/religion/articles/2010/11/09/3061317.htm?site=northwest>; accessed 1 February 2010.

that “any prime minister is vulnerable if unable to halt the flow of boats. Put another way, every [prime minister] needs to show credibility as a border protectionist”.<sup>128</sup> On 28 March 2010, the 100<sup>th</sup> boat to arrive during the Rudd government was intercepted, a symbol of the new boat “crisis”, which Abbott seized in order to suggest the Government had “lost control of Australia’s borders”.<sup>129</sup> By April 2010, the number of irregular maritime arrivals for 2010 was already approaching the total number of arrivals in 2009. An Essential poll revealed that not honouring election commitments (24%) and being too soft on asylum seekers (15%) were the top two reasons people gave for their view of Rudd becoming less favourable.<sup>130</sup> The asylum seeker issue was, in the words of Immigration Minister Chris Evans, “killing the government”.<sup>131</sup>

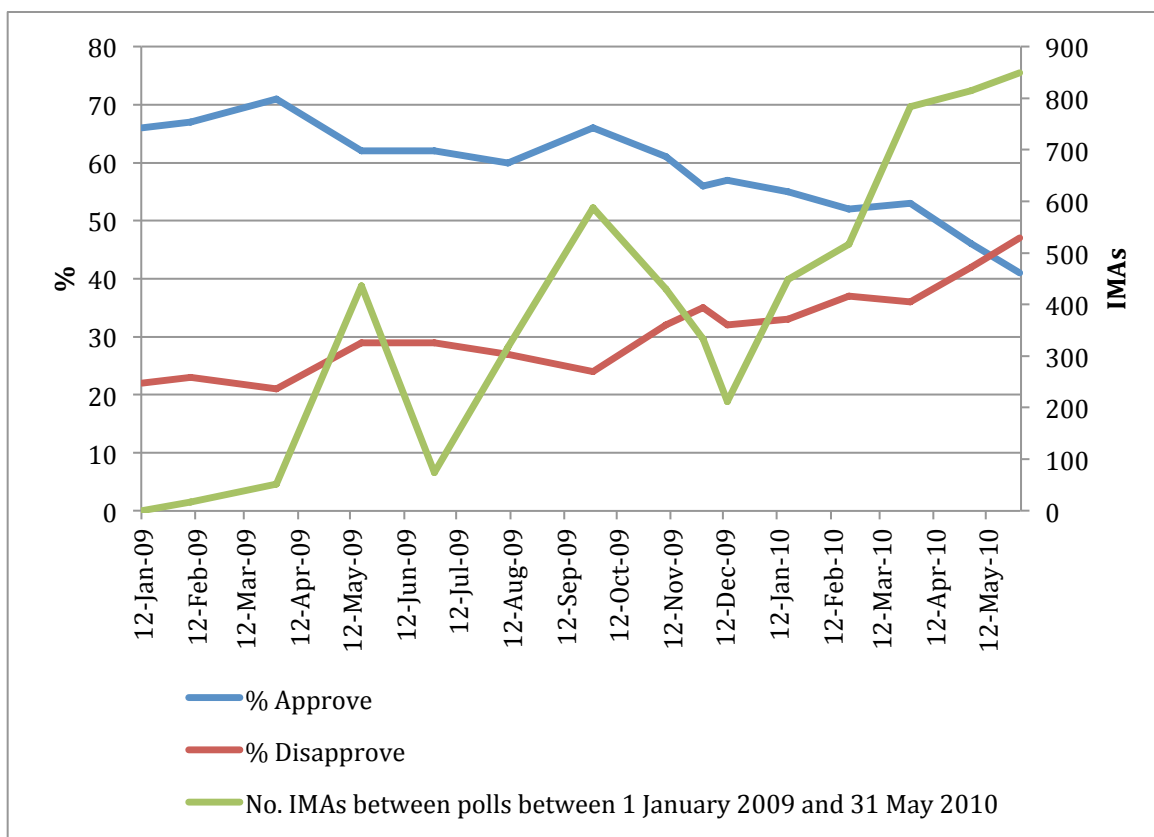
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<sup>128</sup> Paul Kelly, ‘Abbott Tries for Tampa Poll’, *The Australian* 29 May 2010, <http://www.theaustralian.com.au/news/opinion/abbott-tries-for-tampa-poll/story-e6frg6zo-1225872728950>; accessed 20 March 2012.

<sup>129</sup> Opposition leader Tony Abbott quoted in Steve Lewis, ‘Australia’s Refugee Policy Sunk by 100<sup>th</sup> Boatload’, *The Daily Telegraph*, 30 March 2010.

<sup>130</sup> Essential Research, Essential Report, 24 May 2010, [http://essentialvision.com.au/documents/essential\\_report\\_130311.pdf](http://essentialvision.com.au/documents/essential_report_130311.pdf); accessed 16 March 2013.

<sup>131</sup> Michelle Grattan and Tom Allard, ‘Asylum Seeker Debate “Killing” Government’, *The Age*, 15 July 2010, <http://www.smh.com.au/national/asylum-seeker-debate-killing-government-20100714-10b4r.html>; accessed 31 March 2013.



**Figure 4.2.6: Number of IMAs arriving between Essential polls concerning Rudd’s approval/disapproval ratings**

Source: Essential Research polls cited in Andrew Bunn, ‘Essential: The Polling Slide that Evicted Rudd from the Lodge’, *Essential Report*, 25 June 2010, <http://essentialvision.com.au/essential-the-polling-slide-that-evicted-rudd-from-the-lodge>; accessed 31 March 2013; and DIAC data supplied by Cath Wilson, Assistant Secretary, Immigration Intelligence Branch to Marg Hutton, November 2011, <http://sievx.com/dbs/boats/>; accessed 18 January 2017.

### The Big Chill

With an election looming, the Government needed to appear tougher to ameliorate voter concerns about border protection or find a way to shut down or, at least, suspend the asylum seeker issue before the election. It concocted a plan to achieve both. If the Government could not stop the boats from arriving, it could find a way to block access to Australia’s protection obligations and, in this way, appear in control of Australia’s borders. Thus, in April 2010, despite having acknowledged that the surge in asylum seekers from Afghanistan and Sri Lanka was part of a global trend driven by ongoing conflict, insecurity and

persecution in those countries,<sup>132</sup> the Government implemented a 3-month freeze on asylum applications for Sri Lankan applicants and a 6-month freeze for Afghan applicants, who together comprised approximately 80% of boat arrivals at the time.<sup>133</sup> In essence, the idea behind the processing suspension was to ride out the surge in arrivals from these two countries until more favourable country assessments could be used to reject a greater number of otherwise legitimate asylum claims. As Rudd explained, “The combined effect of this suspension and the changing circumstances in these two countries will mean that more asylum seekers from Sri Lanka and Afghanistan will be refused.”<sup>134</sup> The Government cited the recent democratic elections as evidence that conditions in Sri Lanka were improving while the anticipated change in the situation in Afghanistan was based on a DFAT cable sent from the Australian Embassy in Kabul in February 2010, which suggested that Hazaras were “living in a golden age” and were leaving for economic reasons.<sup>135</sup> This was despite evidence to the contrary, demonstrating that the security situation in Afghanistan had deteriorated since 2009 with ongoing targeting of Hazaras by the Taliban, who were poised to regain power in local regions.<sup>136</sup> A UN report found that there had been more civilian casualties in

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<sup>132</sup> See, for example, Attorney-General Robert McClelland, second reading speech for the Anti-People Smuggling and Other Measures Bill 2010, 24 February 2010, *Commonwealth Parliamentary Debates*, House of Representatives [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-02-24/0009/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-02-24/0009/hansard_frag.pdf;fileType=application%2Fpdf); and Immigration Minister Chris Evans, second reading speech for the Anti-People Smuggling and Other Measures Bill 2010, *Commonwealth Parliamentary Debates*, House of Representatives 18 March 2010, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-03-18/0086/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-03-18/0086/hansard_frag.pdf;fileType=application%2Fpdf).

<sup>133</sup> Chris Bowen, Stephen Smith and Brendan O'Connor, ‘Changes to Australia’s Immigration Processing System’, joint media release, 9 April 2010, <http://pandora.nla.gov.au/pan/25167/20100629-0819/www.foreignminister.gov.au/releases/2010/fa-s100409.html>; accessed 27 April 2017.

<sup>134</sup> Kevin Rudd, April 2010, quoted in Chris Uhlmann, ‘Carbon Tax, Border Protection and Leadership’, *7:30 Report*, 10 October 2011, <http://www.abc.net.au/7.30/content/2011/s3336424.htm>; accessed 18 March 2012.

<sup>135</sup> See Paul Maley and Lanai Vasek, ‘Processing Ban on Afghan Asylum-Seekers Lifted’, *The Australian*, 1 October 2010, <http://www.theaustralian.com.au/national-affairs/processing-ban-on-asylum-lifted/story-fn59niix-1225932583358>; accessed 9 March 2012.

<sup>136</sup> William Maley, ‘On the Position of the Hazara Minority in Afghanistan’, *Ataullah’s Blog*, 28 June 2010, <http://ataullahnaseri.wordpress.com/2010/06/28/on-the-position-of-the-hazara-minority-in-afghanistan/>; accessed 7 June 2013; Denise Phillips, ‘Hazaras’ Persecution Worsens: Will the New Government Show Leadership by Lifting the Suspension on Afghani Asylum Claims?’, *Australian Policy Online*, August 2010, <http://aph.org.au/hazaras-persecution>; accessed 7 June 2013; United Nations Secretary-General, ‘The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General’, United Nations, New York, A/64/705 – S/2010/127, 10 March 2010.

2009 than any year since the fall of the Taliban in 2001.<sup>137</sup> The ongoing danger faced particularly by Hazaras in Afghanistan was highlighted by the forcible displacement of 1,800 families in May 2010, the discovery of the decapitated corpses of 11 Hazara men in June, and a series of attacks on schools by the Taliban in July.<sup>138</sup>

The Government also introduced new measures to toughen anti-people-smuggling laws with the creation of the new offence of supporting people smuggling – even for entirely humanitarian reasons rather than personal profit – punishable by up to ten years imprisonment and/or a fine of \$110,000.<sup>139</sup> Thus, while asylum seekers who paid for their own voyage or those of family members on the same venture were exempt, this legislation targeted not only commercial operators but also members of refugee communities and support groups in Australia who might engage, pay, or otherwise help a people smuggler to bring other family members or friends to Australia. It also imperilled those who might unwittingly carry an asylum seeker to Australia or come to the aid of asylum seekers in distress at sea and bring them to Australia (as Arne Rinnan, Captain of the *Tampa*, had done in 2001).<sup>140</sup> The Anti-People Smuggling and Other Measures Bill 2010 was passed by both houses of Parliament in May, with the Act coming into effect immediately.

Neither measure sought to address the reasons why people undertook risky journeys in order to seek asylum in Australia. The further criminalisation of people smuggling simply made those journeys more difficult and thus more dangerous and the suspension of processing

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<sup>137</sup> United Nations Assistance Mission in Afghanistan, 'Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009', UNAMA, Human Rights, Kabul, January 2010, <http://unama.unmissions.org/Portals/UNAMA/human%20rights/Protection%20of%20Civilian%202009%20report%20English.pdf>; accessed 7 June 2013.

<sup>138</sup> Denise Phillips, 'Why Hazaras Flee: An Historical Perspective of their Persecution', submission to the Government's Expert Panel on Asylum Seekers, 25 July 2012, <http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/public-submissions/PhillipsD.pdf>; accessed 7 June 2013, pp. 6-7; Ismail Sameem, Jonathon Burch and Paul Tait, 'Police Find 11 Beheaded Bodies in Afghan South', *Reuters*, 25 June 2010, <http://www.reuters.com/article/2010/06/25/us-afghanistan-beheading-idUSTRE65O2ML20100625>; accessed 7 June 2013.

<sup>139</sup> See Chris Evans, 'Legislation to Combat People Smuggling', media release, 23 February 2010, <http://www.minister.immi.gov.au/media/media-releases/2010/ce10016.htm>; accessed 16 March 2013; Bowen, Smith and O'Connor, 'Changes to Australia's Immigration Processing System'.

<sup>140</sup> See Mary Crock interviewed by Richard Aedy, *Life Matters* [radio program], ABC, 20 April 2010, <http://www.abc.net.au/rn/lifematters/stories/2010/2876845.htm>; accessed 2 April 2013.

made them more futile; but neither stopped the boats. The suspension was an imaginative interpretation of Australia's international obligations under the UN Refugee Convention and other international treaties but it was not without precedent; in 2002, Afghan asylum seekers sewed their lips together to speak of their despair when the Howard government put a freeze on the processing of their asylum claims in response to reported changes in the situation in Afghanistan.<sup>141</sup> Legal experts warned that it breached the principle of non-discrimination in Article 3 of the Refugee Convention, which directs that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”, as well as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, while the resulting prolonged detention amounted to arbitrary detention in contravention of Article 9(1) of the ICCPR.<sup>142</sup> As well as jeopardizing Australia's international reputation,<sup>143</sup> it also made a mockery of Labor's own new detention values, namely the use of detention as a last resort and for the shortest time practicable. While Julian Burnside described the new policy as “Howard-lite”,<sup>144</sup> David Manne argued the suspension was worse than the Howard government's temporary protection visas.<sup>145</sup>

Like Howard's TPV scheme, the move proved popular with voters, garnering the support of more than two thirds of the public (who nonetheless felt that the Government was too soft on asylum seekers).<sup>146</sup> But if its purpose was to deter further arrivals, then, just as temporary

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<sup>141</sup> See Frank Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, University of Queensland Press, Brisbane, 2003, p. viii.

<sup>142</sup> Debbie Mortimer, Chris Horan and Kathleen Foley, ‘Refugee Rights: Processing Suspension Breaches International and Domestic Human Rights Law’, Joint Memorandum of Advice, Human Rights Law Resource Centre, 23 May 2010, <http://www.hrlrc.org.au/files/Suspension-Policy-Joint-Opinion-20-05-10.pdf>; accessed 23 March 2013.

<sup>143</sup> See, for example, Agence France-Presse, ‘UNHCR Concerned about Australia's Asylum Freeze’, *Google Hosted News*, 17 April 2010.

<sup>144</sup> Julian Burnside quoted in Chris Merritt, ‘Asylum-Seeker Policy Changes Likely to Backfire, Say Refugee Advocates’, *The Australian*, 10 April 2010.

<sup>145</sup> David Manne in Katharine Murphy and Michelle Grattan, ‘Rudd Backflip Slams Asylum Seeker Door’, *The Age*, 10 April 2010.

<sup>146</sup> 69% of respondents approved of the Government's decision to suspend the processing of refugee claims including 70% of Labor voters, 80% of Coalition supporters and, perhaps most surprisingly, 47% of Greens voters. Only 15% disapproved of the move. Essential Research, ‘Federal Government and the Suspension of

protection visas had been, it was ultimately ineffective. A further 57 boats arrived during the period of the freeze and the number of asylum seekers arriving to Australia by boat reached a new record high of more than 6,500 by the end of 2010. It led to overcrowding in detention centres and exacerbated despair, creating tensions, to which the Government responded by sending a riot squad from the Australian Federal Police to Christmas Island following the policy's announcement.<sup>147</sup> The Government was forced to reopen deactivated detention centres and to open a new facility near Weipa on Cape York.<sup>148</sup> It also resulted in a sizeable backlog of applications pending assessment, with some 1,200 applications awaiting assessment by 1 October when the ban on Afghan applications was lifted.<sup>149</sup>

### **A Political Martyr?**

However, Rudd did not survive long enough to review the impact of the suspension. He was replaced as leader of the ALP and Prime Minister of Australia on 24 June 2010 after failing to contest a challenge by his deputy, Julia Gillard. Robert Manne contends that "Rudd's honourable refusal to compete in what he called a race to the bottom [with the Coalition on asylum policy] was one of the reasons he was removed from the leadership of the Labor Party."<sup>150</sup> Abbott had set the terms of the race when he announced the Coalition's rival border protection policy at the end of May, a revival of the Pacific Solution designed to draw attention to the Coalition's "successful" record in this area. In a press release titled 'Restoring Sovereignty and Control to Our Borders', Abbott promised to reintroduce offshore processing (though he refused to canvas potential locations), temporary protection visas and to turn back boats wherever possible. He repeatedly emphasised that "[t]hese policies have worked before to ensure that it is the Australian Government that decides who comes to our

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Refugee Claims', *Essential Report*, 19 April 2010, <http://www.essentialvision.com.au/federal-government-and-the-suspension-of-refugee-claims>; accessed 27 April 2017.

<sup>147</sup> See Matthew Franklin and Paige Taylor, 'Kevin Rudd Shuts Refugee Door', *The Australian*, 10 April 2010.

<sup>148</sup> Maley and Vasek, 'Processing Ban on Afghan Asylum-Seekers Lifted'.

<sup>149</sup> *Ibid*; Dennis Shanahan, 'Freeze Did Nothing Except Create Lengthy Backlog', *The Australian*, 1 October 2010, <http://www.theaustralian.com.au/news/opinion/freeze-did-nothing-except-create-lengthy-backlog/story-e6frg6zo-1225932586158>; accessed 9 March 2012.

<sup>150</sup> Manne, 'The Moral Dilemma of Asylum Seeker Policy'.

country and the circumstances under which they come – not people smugglers or those who have the means to pay them.”<sup>151</sup>

These policies appealed to the electorate, 31% of whom felt that all asylum seekers arriving in Australia by boat should be returned to their countries of origin *even if they were genuine refugees*.<sup>152</sup> Almost two thirds (62%) supported the proposed reintroduction of offshore processing.<sup>153</sup> The support for the Coalition’s border protection policies did little for Abbott’s personal approval rating, which was as dismal as Rudd’s (41% accompanied by a 51% and 52% disapproval rating respectively), however, a Nielson poll released on 7 June 2010 showed the Coalition leading Labor on a two-party-preferred basis 53% to 47%, representing a swing of 5.7% since the 2007 election.<sup>154</sup> These poll results spelt danger for Rudd. His poor personal ratings were one thing, but now that the party too faced possible electoral defeat his future was suddenly uncertain. However, Rudd refused to countenance a return to offshore processing.<sup>155</sup> As he explained on the eve of his deposal, “I believe it is absolutely wrong for this country ... in terms of the values which we hold dear, to get engaged in some sort of race to the right in this country on the question of asylum-seekers. I don’t think that’s the right thing to do. That’s the direction the Liberal Party would like to take us - under my leadership we will not be going in that direction.”<sup>156</sup>

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<sup>151</sup> Tony Abbott, Leader of the Opposition, ‘Restoring Sovereignty and Control to Our Borders’, joint media release, 27 May 2010, <http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/7405/Joint-Press-Release--Restoring-sovereignty-and-control-to-our-borders.aspx>; accessed 20 March 2012.

<sup>152</sup> Essential Research, ‘Essential Report’, 15 June 2010, <http://www.essentialmedia.com.au/tag/asylum-seekers/page/3/>; accessed 5 April 2013.

<sup>153</sup> Nielsen poll for Fairfax released 7 June 2010 and reported in Possum Comitatus, ‘Nielsen – Offshore Processing and the RSPT’, *Crikey*, 7 June 2010, <http://blogs.crikey.com.au/pollytics/2010/06/07/nielsen-offshore-processing-and-the-rspt/>; accessed 5 April 2013; Phillip Coorey, ‘Labor Faces Wipeout’, *Sydney Morning Herald*, 7 June 2010.

<sup>154</sup> Nielson poll cited in Coorey, ‘Labor Faces Wipeout’.

<sup>155</sup> See, for example, Kevin Rudd, interview with David Koch on *Sunrise*, 28 May 2010, <http://pandora.nla.gov.au/pan/79983/20100624-1429/www.pm.gov.au/node/6790.html>; accessed 5 April 2013.

<sup>156</sup> Kevin Rudd, transcript of press conference, republished in *AdelaideNow*, 23 June 2010, <http://www.adelaidenow.com.au/transcript-of-prime-minister-rudds-speech/story-e6frea6u-1225883458033>; accessed 18 March 2012.



Rudd's response to the challenge suggests that he regarded himself, like his moral hero, Dietrich Bonhoeffer, as something of a political martyr for the asylum cause. His pointed declaration that under his continued leadership the Government would "not be lurching to the right on the question of asylum-seekers" implied that the Prime Minister had been under pressure – and resisted calls – to implement harsher policies that could garner public support or be replaced by a leader who would.<sup>157</sup> This is not to suggest that asylum policy was the only, or even the principal, reason why Rudd was replaced as leader. However, Gillard's first public addresses after assuming the leadership, in which she identified asylum policy as one of a handful of priority problem areas for which she would provide a "fix" prior to the election, confirmed it was one of the key points of contention. But, as this chapter demonstrates, Rudd's downfall was not a case of political martyrdom (i.e. standing fast to one's principles until the very end) so much as a failure of moral leadership (i.e. failing to stand by one's principles in the face of adversity) of the very type that Bonhoeffer wrote critically of during his imprisonment for his role in smuggling Jews out of Germany:

The 'reasonable' people's failure is obvious. With the best intentions and a naïve lack of realism, they think that with a little reason they can bend back into position the framework that has got out of joint. In their lack of vision they want to do justice to all sides, and so the conflicting forces wear them down with nothing achieved. Disappointed by the world's unreasonableness, they see themselves condemned to ineffectiveness; they step aside in resignation or collapse before the stronger party.<sup>158</sup>

The Rudd Government's new humanitarian approach to asylum seekers was conceived during a period of respite from boat arrivals and proved to be a fair weather policy; when tested by rising boat numbers and diminishing public support in 2009, the Government abandoned its new detention values and resorted, like previous governments, to reactive, *ad hoc* measures designed to prevent, rather than protect, the vulnerable stranger from ever

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<sup>157</sup> *Ibid.*

<sup>158</sup> Dietrich Bonhoeffer, 'Who Stands Fast?', *Letters and Papers from Prison*, [http://www.allchurch.org/ministries/index\\_5.html](http://www.allchurch.org/ministries/index_5.html); accessed 10 April 2013.

reaching our midst. Thus, despite a promising beginning, like much of Rudd's broader policy agenda (e.g. climate change), the changes to asylum policy promised by the Rudd Government in its first term ultimately proved to be more symbolic than substantive, more transient than transformative, more rhetorical than real.

In fact, the shift of focus from asylum seekers to people smugglers that Rudd engendered in his first term ultimately lent a moral justification to the implementation of even harsher policies in his second term as Prime Minister. Shortly after his political resurrection in 2013, Rudd lurched further to the right than any of his predecessors when he made the "very hard-line decision"<sup>159</sup> to banish *all* (not just some) asylum seekers arriving by boat to Papua New Guinea or Nauru with no hope of resettlement in Australia *ever* and the possibility of indefinite detention for those who could be neither returned to their home countries nor resettled outside of Australia. While the new measures were unashamedly aimed at "Australians [who had] had enough" of unauthorised boat arrivals, which peaked at more than 25,000 in 2012-13, Rudd defended them on the grounds that they would save unfortunate asylum seekers from being exploited by evil people smugglers and, adopting the rationale that had been employed by Gillard (see next chapter), prevent further deaths at sea.<sup>160</sup> But the fact that there was no coterminous increase in the refugee intake, that is, more legal pathways for refugees, belied the humanitarian intention of these measures. The tragic effects of these policies, which have left a group of refugees and asylum seekers who sought Australia's protection trapped on these small and isolated islands in the South Pacific where the locals are hostile to their presence, have recently been exposed with the publication by *The Guardian* newspaper of the Nauru files, some 2,100 leaked incident reports documenting the deteriorating mental and physical health, self-harm and alleged abuse of those detained on Nauru.<sup>161</sup>

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<sup>159</sup> Kevin Rudd, joint press conference with the Prime Minister of Papua New Guinea, the Minister for Immigration and the Attorney-General, Brisbane, 19 July 2013, <http://pmtranscripts.dpmc.gov.au/browse.php?did=22763>; accessed 16 April 2015.

<sup>160</sup> Kevin Rudd, 'Australia and Papua New Guinea Regional Settlement Arrangement', media release, 19 July 2013, <http://pmtranscripts.dpmc.gov.au/release/transcript-22764>; accessed 26 May 2016.

<sup>161</sup> The Nauru files can be accessed via *The Guardian* website: <https://www.theguardian.com/news/series/nauru-files>.

Unlike Bonheoffer, Rudd did not stand – and die – by his principles. When he could not change the debate he allowed himself to be changed by it. Despite his best intentions and elegant rhetoric, Rudd did not produce a more humane set of policies; indeed, his Government ultimately implemented policies that went even further than those of his predecessor, John Howard, and for which his successor, Tony Abbott, who welcomed the PNG regional settlement agreement as “a promising development in offshore processing”, could but thank him for.<sup>162</sup> With respects to asylum seekers, Rudd failed in both political and moral terms: his tough policies failed to stop the boats and his humane measures failed to protect, but instead punished, the vulnerable stranger.

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<sup>162</sup> Lenore Taylor, ‘Rudd Announces Deal to Send All Asylum Boat Arrivals to Papua New Guinea’, *The Guardian*, 19 July 2013, <http://www.theguardian.com/world/2013/jul/19/kevin-rudd-asylum-boats-png>, accessed 19 July 2013.

## 4.3 Sanctuary Australia: The Gillard Government's Asylum Seeker Policies, 2010-2013

You want to know who lives next door – that's nothing to do with race; it's to do with safety. ... We don't know who they are, where they come from. You've got your daughters and grandsons in the community.<sup>1</sup>

I can understand that sense of anxiety. This country is a sanctuary, it's our home so we've got a responsibility to manage our borders and manage the question of asylum seekers in the best possible way.<sup>2</sup>

More than 6,000 asylum seekers arrived by boat during Kevin Rudd's first term as Prime Minister after his Government ended offshore processing in the Pacific and abolished temporary protection visas, making it a very visible "problem" for his successor, Julia Gillard, to "solve" after taking over the leadership in June 2010. This chapter critically examines the solutions to the problem of unauthorised boat arrivals pursued by the Gillard Government during its three-year period in office. Replacing Rudd's failed idealism with a political pragmatism, Gillard promised to "take control" of Australia's future and to build "a sanctuary for all of our people".<sup>3</sup> Her tenure, however, was marked by the greatest number and rate of irregular maritime arrivals of any government thus far – nearly 40,000 in just three years – and also the greatest number of known asylum seeker deaths at sea since the start of the millennium. Her response to this situation was, in many ways, shaped by the need to legitimise her leadership ahead of an early election in 2010 and by the result of that election, which produced a minority government held together by crossbench support.

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<sup>1</sup> Penrith service station manager, Michelle Beale, quoted in Erik Jensen, 'If You Look in the Mirror, You See Fear and Distrust Coming Ashore', *Sydney Morning Herald*, 15 October 2011.

<sup>2</sup> Prime Minister Julia Gillard, joint press conference with Deputy Prime Minister Wayne Swan, Parliament House, Canberra, 24 June 2010, <http://www.pm.gov.au/press-office/joint-press-conference-deputy-prime-minister-wayne-swan>; accessed 30 July 2010.

<sup>3</sup> *Ibid.*

Despite the fragility of her position, Gillard managed to secure passage for legislation at a record rate.<sup>4</sup> However, her attempts to construct and implement an effective, long-term, regional cooperative solution to the vexing problem of unauthorised boat arrivals were stymied by the resistance of regional partners, judicial obstruction and Opposition obstinacy. Under these constraints and with unrelenting boat arrivals and mounting boat tragedies, preventing deaths at sea became the underlying justification for the abandonment of key Labor principles and the implementation of a set of policies that sat very firmly within the Australian tradition as exemplified by the Howard Government.

### **Big dreams and deep sleeps**

In her maiden speech to Parliament in 1996, independent member Pauline Hanson called for the radical revision of immigration policy with a view to restricting Asian immigration. “If I can invite whom I want into my home”, she argued, “then I should have the right to have a say in who comes into my country”.<sup>5</sup> Liberal Prime Minister John Howard was widely criticized but remained unapologetic for his refusal to respond to Pauline Hanson’s maiden speech or censure her inflammatory remarks on immigration and race. He thought that the “obsession” with Hanson’s speech was “ridiculous” and expected that that “in six months, people [would] look back in amazement and say, good heavens, what was that all about?”<sup>6</sup> But two years later, in her inaugural speech to Parliament in November 1998, the new Labor Member for Lalor, Julia Gillard, recalled and repudiated Hanson’s speech, drawing on the obvious physical similarities between her and the One Nation leader in order to make clear the differences between them:

What the last red-headed woman who made a first speech in this place will never understand is that the vast majority of migrants come here determined to make a

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<sup>4</sup> The Gillard Government successfully passed 561 bills in three years, making it the highest rate of passing legislation of any Australian government, a particularly impressive record for a minority government. See Nick Evershed, ‘Was Julia Gillard the Most Productive Prime Minister in Australia’s History?’, *The Guardian*, 28 June 2013, <https://www.theguardian.com/news/datablog/2013/jun/28/australia-productive-prime-minister>; accessed 9 March 2017.

<sup>5</sup> Pauline Hanson, independent Member of Parliament and subsequent leader of the One Nation Party (1997-2004), maiden speech to Federal Parliament, *Commonwealth Parliamentary Debates* (henceforth CPD), House of Representatives (henceforth HoR), Canberra, 10 September 1996, p. 3862.

<sup>6</sup> John Howard, interviewed by John Laws on 2UE, quoted in Michael Millett, ‘PM Rejects Talk of Our Racist Past’, *Sydney Morning Herald*, 25 October 1996, p. 1.

better life for themselves and their kids, and they are prepared to work unbelievably hard to achieve that dream.<sup>7</sup>

Gillard's own parents were amongst these ambitious, hard-working migrants. Like so many others, the future prime minister of Australia emigrated to this country from Wales as a child with her family. In her maiden speech Gillard paid tribute to her parent's courage and determination to provide a better life for their children, noting that "Australia has offered me opportunities that would have been beyond my parents' understanding when they stepped off that boat in Adelaide in 1966... It would have been inconceivable to them that their child, and a daughter at that, could be offered the opportunity to obtain two degrees from a university and to serve in the nation's parliament."<sup>8</sup> Much more besides opportunities for females in public life had changed since the middle of the twentieth century, and it was the rapid rate of change that Gillard suggested was responsible for the popularity of Pauline Hanson and One Nation in Australia and the rise of the Right more generally across the globe. The sense of insecurity and powerlessness over their lives and futures that people felt in the face of these changes gave rise to both "simple nostalgia" and "the spectacle of the frightened turning on the vulnerable".<sup>9</sup> According to Gillard, "[e]ndless remakes of the songs and movies of the 1960s and 1970s and the rise of reactionary politics have something in common—both seek a return to a mythical, simpler time, a deep and dreamless sleep."<sup>10</sup>

If it was inconceivable to Moira and John Gillard when they arrived in Australia in the 1960s that their daughter would one day serve in the nation's parliament, they must have been astonished when, in June 2010, she replaced Kevin Rudd as leader of the Labor party thereby becoming the nation's 27<sup>th</sup> – and first female – Prime Minister. In explaining the coup, Gillard argued that Rudd's was "a good Government [that] was losing its way".<sup>11</sup> More

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<sup>7</sup> Julia Gillard, maiden speech to Federal Parliament, *Commonwealth Parliamentary Debates*, House of Representatives, 11 November 1998, <http://www.aph.gov.au/house/members/firstspeech.asp?id=83L>; accessed 20 July 2010.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Gillard, joint press conference with Swan, 24 June 2010.

importantly, it was losing voters. Following, amongst other things, the *Oceanic Viking* episode in October 2009, his empty-handed return from the Copenhagen climate change summit in December, and the postponement of the emissions trading scheme in April 2010 (see previous chapter), public confidence in Rudd had declined rapidly. Voters began to lose faith in Rudd's capability as a leader, his ability to manage a crisis and his trustworthiness.<sup>12</sup> His personal approval rating was overtaken by his disapproval rating for the first time in May 2010 with a net approval rating of -6 according to an Essential poll taken on 31 May 2010.<sup>13</sup> Despite her own key role in his Government as his deputy, Gillard was relatively untarnished from this fall from grace. Polls showed that while Rudd's popularity was declining, her stocks as a potential leader were rising. She was much more popular than the Opposition leader, preferred by 50% of respondents compared to 32% in favour of Tony Abbott, and commanded more support from women and non-Labor voters than Rudd.<sup>14</sup> Gillard thus appeared likely to capture some swinging voters as well as potentially luring back disappointed Labor voters who had abandoned Rudd as he abandoned his political promises.

That the asylum seeker issue was at least part of the reason he was replaced was suggested by Rudd on the eve of his deposal, when he ominously warned of a shift to the Right within the Government on asylum policy and promised to continue to resist pressures to reinstate offshore processing. It was also made clear by Gillard's immediate priorities as Prime Minister, which included renegotiating the resources super profits tax with mining industry interest groups, building community consensus for action on climate change, and finding a way to stop the boats before calling an election to seek a mandate for her policies.<sup>15</sup> As outlined in the previous chapter, Labor, under Rudd in his first term as Prime Minister, had ended offshore processing in the Pacific and abolished the mandatory temporary protection visa (TPV) scheme for refugees who had arrived in an unauthorized manner during a relative

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<sup>12</sup> See Andrew Bunn, 'Essential: The Polling Slide that Evicted Rudd from the Lodge', *Essential Report*, 25 June 2010, <http://essentialvision.com.au/essential-the-polling-slide-that-evicted-rudd-from-the-lodge>; accessed 31 March 2013.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> See Gillard, joint press conference with Swan, 24 June 2010; and Julia Gillard, 'Moving Australia Forward', Lowy Institute, Sydney, 6 July 2010, <http://www.pm.gov.au/node/6876>; accessed 13 July 2010.

lull in boat arrivals, an “audacious experiment”<sup>16</sup> that left the Government vulnerable to criticism that it had relinquished control of Australia’s borders when the boats began arriving again, in larger numbers than ever before. Gillard had warned Rudd shortly before the coup that this “[l]oss of control of the borders is feeding into a narrative of a government that is incompetent and out of control.”<sup>17</sup> The Coalition sought to highlight and exploit this with a mobile billboard campaign counting the number of “illegal” boats that had arrived under Labor, which, much to the Opposition’s gratification, needed updating before it was even launched after another boat was intercepted.<sup>18</sup> Even so, asylum seeker numbers were small relative to the global situation, as the prominent barrister and refugee advocate Julian Burnside pointed out, estimating that it would take at least two decades to fill the iconic Melbourne Cricket Ground with people arriving by boat at the current rate.<sup>19</sup> As Prime Minister, Gillard duly acknowledged this fact but nevertheless defended the public panic about it, sympathising with Australians who were “disturbed when they see boats arrive on our shores unannounced” and claiming to “understand that sense of anxiety”. “This country is a sanctuary”, she said, “it’s our home so we’ve got a responsibility to manage our borders and manage the question of asylum seekers in the best possible way.”<sup>20</sup>

On this question, Gillard seemed to have more in common with John Howard than her Labor predecessor. The cosmopolitan rhetoric of the Rudd era was gone. With her reassurances to “hard-working Australians” who “play by the rules... and love their country”<sup>21</sup> that she would “take control” of Australia’s future and build “a sanctuary for all of

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<sup>16</sup> Paul Kelly, ‘Rudd’s Softer Stance Mugged by Reality’, *The Australian*, 17 October 2009, <http://www.theaustralian.news.com.au/story/0,25197,26220271-12250,00.html>; accessed 20 October 2009.

<sup>17</sup> Email from Gillard to Rudd on 21 June 2010, cited in Robert Manne, ‘Broken Faith in Politics’, *The Monthly*, May 2015, <http://www.themonthly.com.au/issue/2015/may/1430402400/robert-manne/broken-faith-politics>; accessed 4 May 2015

<sup>18</sup> Karlis Salna, ‘Abbott Unveils “Asylum Seeker” Billboard’, *Sydney Morning Herald*, 21 April 2010, <http://www.smh.com.au/breaking-news-national/abbott-unveils-asylum-seeker-billboard-20100421-swmp.html>; accessed 21 April 2010.

<sup>19</sup> Julian Burnside, ‘Comfort All Who Flee Fear’, *Sydney Morning Herald*, 6 July 2010, <http://www.smh.com.au/federal-politics/political-opinion/comfort-all-who-flee-fear-20100705-zxht.html>; accessed 21 December 2016.

<sup>20</sup> Gillard, joint press conference with Swan, 24 June 2010.

<sup>21</sup> *Ibid.*



our people”,<sup>22</sup> Gillard was appealing to those same voters who had looked to One Nation and worried Howard and his party so much in 2001 before the *Tampa* inadvertently sailed to their rescue. Gillard’s argument that “[p]eople should feel free to say what they feel and for people to say they’re anxious about border security doesn’t make them intolerant [or] racist”<sup>23</sup> was reminiscent of Howard in 1996, when he argued that Pauline Hanson’s outspokenness was a victory for free speech over the political correctness of elites<sup>24</sup> and when he expressed sympathy “with Australians who are insulted when they are told we have a racist, bigoted past”.<sup>25</sup> In fact, Gillard found an unlikely ally in Hanson, who praised her comments and her call for a “frank, open, honest national conversation on the issues of border protection and asylum seekers”,<sup>26</sup> which, Hanson claimed, reiterated her own message more than a decade earlier. Indeed, Gillard’s description of the nation as a sanctuary echoed Hanson’s depiction of the nation as a home into which she did not want to invite refugees.<sup>27</sup> The only difference, according to Hanson, was that “She’s prime minister. I was ... vilified because I was just an ordinary backbencher from a small business shop and at that time it was politically incorrect to come out and say these things. Good luck to her for saying it. I hope she finds the answers.”<sup>28</sup>

### **A solution of one’s own – Gillard’s East Timor plan**

Gillard’s initial answer was outlined in her first major policy address as Prime Minister in July at the Lowy Institute, where she detailed her political priorities and plan of action for “moving Australia forward” on those issues on which the Rudd Government had stalled,

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<sup>22</sup> *Ibid.*

<sup>23</sup> Julia Gillard, doorstep interview, Marysville, 4 July 2010, <http://pmtranscripts.pmc.gov.au/release/transcript-17409>; accessed 2 January 2016.

<sup>24</sup> John Howard at a conference of the Queensland Liberal Party, 22 September 1996, quoted in Robert Manne, ‘The Howard Years: A Political Interpretation’, in Robert Manne (ed.), *The Howard Years*, Melbourne: Black Inc. Agenda, 2004, p. 16.

<sup>25</sup> Howard quoted in Millet, ‘PM Rejects Talk of Our Racist Past’.

<sup>26</sup> Gillard, ‘Moving Australia Forward’.

<sup>27</sup> Hanson, maiden speech to Federal Parliament, 10 September 1996; Hanson quoted in Kevin Meade, ‘Pauline Puts Wind Up the Big Boys’, *The Australian*, 15 February 2001, p. 4.

<sup>28</sup> Pauline Hanson quoted in Phillip Coorey and Damien Murphy, ‘Gillard’s Mission Improbable’, *Sydney Morning Herald*, 10 July 2010, <http://www.smh.com.au/national/gillards-mission-improbable-20100709-10411.html>; accessed 10 July 2010.

including unwanted boat arrivals and border control.<sup>29</sup> She began her address with a tribute to the Institute's founder, Frank Lowy, who she described as "a great Australian" with "truly great achievements and a remarkable story".<sup>30</sup> Lowy, a self-described 'boat person' had fled anti-Semitism in Europe as a young man after the Second World War, building a family, forging a career and amassing a sizeable fortune in this land of wide open spaces.<sup>31</sup> She described the Opposition's promise that they would turn back the boats as "inflammatory politics", nothing more than a "shallow slogan" and "nonsense", and argued that Australia "should be prepared to accept people in legitimate need just as a young Frank Lowy was accepted 60 years ago".<sup>32</sup> With reference to her own migrant background, she pointed out that immigration and population growth had "always been a part of Australia's story".<sup>33</sup> Lamenting the divisive nature of the debate about asylum seekers, Gillard implored those involved to "[s]top selling our national character short. We are better than this," she insisted, "so much better than this". She spoke of another way, "the path less travelled in recent times [and] the path to move us forward together – to discuss the facts, reject the myths and make our decisions on what we know to be true on the principles that can unite us".<sup>34</sup>

One might have been forgiven, then, for believing that the sanctuary of which she had spoken would encompass those fleeing persecution and seeking Australia's protection. But the principles that would unite the nation behind her Government, Gillard had decided, were those that had worked for Howard, namely stopping the boats, shutting out unwanted, self-selecting refugees, and protecting the Australian way of life. Gillard's promised sanctuary was not a safe haven for the dispossessed but rather the type of protected living space offered by gated communities such as Sanctuary Cove, a "resort-style masterplanned community", on the Queensland coast, which boasts of "an unparalleled lifestyle – combining quality residential living options with world-class community and leisure facilities, amenities,

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<sup>29</sup> Gillard, 'Moving Australia Forward'.

<sup>30</sup> *Ibid.*

<sup>31</sup> See Frank Lowy in conversation with David Gonski, UNSW, November 2013, <http://newsroom.unsw.edu.au/conversation-frank-lowy>; accessed 6 June 2016.

<sup>32</sup> Gillard, 'Moving Australia Forward'.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

infrastructure and 24-hour security”.<sup>35</sup> Just as Howard had, Gillard sought to reassure the public on the issues of immigration and border control, announcing plans to slow population growth and a series of measures designed to enhance Australia’s ‘border security’. This would involve the establishment of an offshore regional processing centre (RPC) to which all authorized onshore arrivals would be removed and processed without “an advantage in the likelihood that they would end up settling in Australia or other countries of the region”.<sup>36</sup> According to Gillard, this would remove incentive for risky boat voyages thus draining the people smuggling business. Gillard suggested the proposed RPC would be based in East Timor, a signatory to the United Nations Refugee Convention since May 2003, which was a key point of differentiation from the Coalition’s preferred offshore partner, Nauru. While preventing queue jumping asylum seekers from accessing “an inside track to special privileges [which] would offend the Australian sense of fair play”,<sup>37</sup> the nation would not close its doors to genuine refugees. Australians, Gillard insisted, could be both “hard-headed” and “open-hearted”.<sup>38</sup> However, she emphasized that those who were accepted for resettlement from offshore locations (such as the proposed RPC and UNHCR camps elsewhere) would be expected “to learn the rules under which we live and abide by those rules... to learn English, enter the workforce, and send their kids to school like everyone else”. In the Australian sanctuary, “the rules are the rules” and “refugees [should] shoulder the same obligations as Australians generally”.<sup>39</sup>

Rather than moving Australia forward, it seemed like Gillard was taking Australia back to the future with a re-hashed version of the Coalition’s Pacific Solution. According to refugee law expert, Jane McAdam, Gillard’s RPC was the reworking of an earlier British plan to deal with unwanted mixed (forced and unforced) migration by establishing “transit processing centres”

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<sup>35</sup> Sanctuary Cove marketing materials, [www.sanctuarycove.com](http://www.sanctuarycove.com); accessed 24 June 2012.

<sup>36</sup> Gillard, ‘Moving Australia Forward’. In later documents, the concept is referred to as a regional assessment centre (RAC).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

outside of the European Union, a proposal inspired by Howard's Pacific Solution.<sup>40</sup> Former Howard Defence Minister Peter Reith called the plan "one of the most extreme cases of vindication I've seen in Australian politics".<sup>41</sup> Like Howard's Pacific Solution, Gillard's East Timor proposal was hastily conceived to provide a solution to Australia's boat problem by outsourcing the detention and processing of asylum seekers to a poorer regional neighbour in return for Australian investment in local infrastructure and services.

It was also flawed in the same ways the Pacific Solution had been. For the proposed regional processing centre to serve its domestic political purpose (demonstrating that the Government was in control of which, and how many, refugees it admitted), it was vital that some resettlement opportunities be provided by countries other than Australia. As David Marr suggests, without New Zealand, "the Pacific Solution would have ended in farce".<sup>42</sup> Of the 1,637 boat people processed on Manus Island and Nauru between 2001-8 (i.e. under the Pacific Solution), New Zealand accepted 401, including the majority of the *Tampa* refugees, for resettlement.<sup>43</sup> Gillard's solution thus relied on securing not only the cooperation of East Timor or another state willing to host the RPC but also New Zealand and/or other countries to share responsibility for the resettlement of processed refugees. There was no mention of who would be responsible for those who could neither be resettled nor returned to their country of origin (people who were found not to be refugees but could not be repatriated in the absence of a return agreement with their country of origin, and those found to be refugees but not accepted for resettlement because of an adverse security assessment, for

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<sup>40</sup> Jane McAdam, 'Gillard's Missing the Boat on Asylum', *Sydney Morning Herald*, 7 July 2010, <http://www.smh.com.au/action/printArticle?id=1678151>; accessed 19 March 2013. See also Thomas Gammeltoft-Hansen, 'The Extraterritorialisation of Asylum and the Advent of "Protection lite"', Danish Institute for International Studies Working Paper 2007/2, <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=30673>; accessed 18 March 2013; and Brett Neilson, 'Between Governance and Sovereignty: Remaking the Borderscape to Australia's North', *Local-Global Journal*, vol. 8, 2010, p. 125.

<sup>41</sup> Peter Reith quoted in Phillip Coorey and Damien Murphy, 'Gillard's Mission Improbable', *Sydney Morning Herald*, 10 July 2010, <http://www.smh.com.au/national/gillards-mission-improbable-20100709-10411.html>; accessed 24 April 2013.

<sup>42</sup> David Marr, 'Pacific Solution No Real Answer', *Sydney Morning Herald*, 18 September 2010.

<sup>43</sup> Elibritt Karlsen, 'Refugee Resettlement to Australia: What are the Facts?', background note, 6 December 2011, Parliament of Australia, Department of Parliamentary Services, Parliamentary Library, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/RefugeeResettlement#\\_ftnref51](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/RefugeeResettlement#_ftnref51); accessed 28 June 2012.

example). Nor was there a concomitant increase in Australia's refugee resettlement quota to support Gillard's claim that the plan was not merely about preventing boats from arriving in Australia but also about improving refugee protection, despite her acknowledgement that external factors (so-called push factors) played a significant role in asylum seeker movements.

### **Protecting the Australian way – Gillard as Shadow Immigration Minister**

It was unsurprising that Gillard was taking a leaf out of the Coalition's manual. In contrast to Rudd's (early) idealism, Gillard, who became Labor's Shadow Minister for Population and Immigration following the 2001 federal election, had always taken a pragmatic approach to asylum seeker and border control policies, arguing that Labor had to "draft a policy that [could] win public support".<sup>44</sup> And as Shadow Immigration Minister in the post-*Tampa* period, this is precisely what she did. In 2002, having declared that she agreed with "Howard's statement from the last election that we and only we should decide who comes to this nation",<sup>45</sup> she (together with then-Opposition leader Simon Crean) crafted an asylum seeker and refugee policy with the object (and title) of 'Protecting Australia and Protecting the Australian Way', which promised a \$600 million investment into an Australian Coastguard who would act as "a cop on the beat 24 hours a day, seven days a week".<sup>46</sup> The "Australian way" was a Janus-faced term that was meant to appeal to both "its educated rights focussed constituency and its traditional blue-collar constituency".<sup>47</sup> It referred both to the Australian way of treating vulnerable strangers decently, and to the Australian way of life that was threatened by, and to be protected from, such outsiders. Although "unauthorized boat arrivals are the worst of all possible outcomes...from Australia's point of view, as a nation managing its borders", Gillard and Crean warned that "[a] unique part of what it is to be Australian will be lost if this nation does not nurture and protect the Australian way of

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<sup>44</sup> Gillard as Shadow Immigration Minister quoted in Jacqueline Kent, *The Making of Julia Gillard*, revised edition, Viking, Melbourne, 2010, p. 204.

<sup>45</sup> Julia Gillard, interviewed by Laurie Oakes, 14 April 2002, [http://sgp1.paddington.ninemsn.com.au/sunday/political\\_transcripts/article\\_1033.asp?s=1](http://sgp1.paddington.ninemsn.com.au/sunday/political_transcripts/article_1033.asp?s=1); accessed 25 January 2013.

<sup>46</sup> Simon Crean and Julia Gillard, 'Protecting Australia and Protecting the Australian Way: Labor's Policy on Asylum Seekers and Refugees', Labor Policy Paper no. 008, December 2002, p. i, [http://australianpolitics.com/parties/alp/policy/02-12-04\\_asylum-seekers.pdf](http://australianpolitics.com/parties/alp/policy/02-12-04_asylum-seekers.pdf); accessed 19 March 2012.

<sup>47</sup> Julia Gillard, 'Winning the Culture War', *The Sydney Papers*, vol. 15, no. 1, 2003, p. 99.

treating people fairly and with compassion.”<sup>48</sup> According to Gillard in 2002, offshore processing, punitive detention, and the detention of children were *not* the Australian way. Under Labor’s policy, asylum seekers who passed the necessary security and health checks would be able to live in supervised hostels in regional communities while their claims were processed. Refugee processing would be fast, fair and transparent. Genuine refugees would be welcomed and treated in “an Australian way”, that is to say, with fairness and decency. But stopping the boats *was* most certainly the Australian way. To this end, the policy document also proposed the establishment of a single worldwide refugee processing system that would resolve the problem of secondary movement of asylum seekers (“queue-jumping”) from countries of first asylum to developed countries like Australia. The principle of ‘no advantage’ was key to this system: “Why pay a people smuggler to get you to a developed nation if, when you get there, you have no better chance of your claim being accepted? From a humanitarian and equity point of view, such a system also ensures that the most disadvantaged people waiting in refugees camps have exactly the same chance of being resettled as an asylum seeker who arrives in a developed country.”<sup>49</sup> It was also a clever appeal to the Australian sense of fairness, the idea of the “fair go” that Howard had successfully exploited in his battle against “queue jumping” asylum seekers. Labor would lead by example, establishing a regional system based on these principles.

Now, as Prime Minister eight years later, Gillard staked her political future on “fixing”, amongst others, the asylum seeker issue which was, in the words of Immigration Minister Chris Evans, “killing the government”.<sup>50</sup> There had already been 3,329 unauthorised asylum seeker arrivals in the first half of 2010 by the time Gillard took over from Rudd in June; by the end of the year this would rise to 6,555, exceeding the previous highest intake of 5,516 in a single year (2001) under Howard.<sup>51</sup> With an election imminent, Gillard needed to

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<sup>48</sup> Crean and Gillard, ‘Protecting Australia and Protecting the Australian Way’.

<sup>49</sup> *Ibid.*

<sup>50</sup> Michelle Grattan and Tom Allard, ‘Asylum Seeker Debate “Killing” Government’, *The Age*, 15 July 2010, <http://www.smh.com.au/national/asylum-seeker-debate-killing-government-20100714-10b4r.html>; accessed 31 March 2013.

<sup>51</sup> Janet Phillips, ‘Boat Arrivals and Boat “Turnbacks” in Australia Since 1976: A Quick Guide to the Statistics’, Parliamentary Library Research Paper, 17 January 2017,

distinguish her Government from that of Rudd, who had been judged “too soft” in his handling of asylum seekers (see Figure 1), and match the tough-talking Abbott Opposition promising to re-implement the popular “tried and tested” policies of the Howard-era.<sup>52</sup> Her 2002 policy document provided a blueprint for doing so. It was her chance to test the regional refugee processing system she had conceived of as Shadow Immigration Minister with Crean. Though Gillard rejected the similarities between her East Timor proposal and the Howard Government’s Pacific Solution,<sup>53</sup> such comparisons worked in the Government’s favour, speaking directly to those “on the front line of our population increase”,<sup>54</sup> the so-called “rednecks in marginal seats”<sup>55</sup> on which the next election would hinge and sending a clear message ahead of the election that her Government had the determination and necessary grit to implement a plan to stop the boats. Gillard concentrated on these marginal seats during the election campaign, taking to naval vessels to promote her border policies<sup>56</sup> in an effort to match Abbott, whose own publicity stunts included a promise to stop the boats within three months and personally manning a 24-hour telephone line in order to make immediate executive decisions to turn back intercepted boats.<sup>57</sup>

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[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/BoatTurnbacks#](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks#); accessed 6 April 2017.

<sup>52</sup> Tony Abbott, Leader of the Opposition, ‘Restoring Sovereignty and Control to Our Borders’, joint media release, 27 May 2010,

<http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/7405/Joint-Press-Release--Restoring-sovereignty-and-control-to-our-borders.aspx>; accessed 20 March 2012.

<sup>53</sup> See, for example, Julia Gillard, interview with Howard Sattler, 6PR, 8 July 2010,

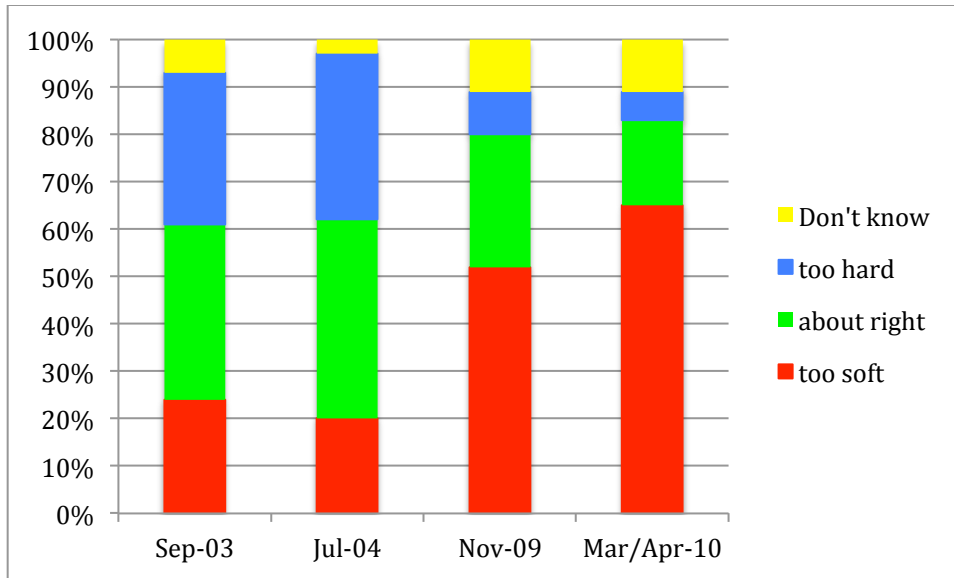
<http://www.pm.gov.au/press-office/transcript-interview-howard-sattler>; accessed 5 May 2013.

<sup>54</sup> Gillard, ‘Moving Australia Forward’.

<sup>55</sup> Julian Burnside quoted by Gillard in *ibid*.

<sup>56</sup> Phillip Hudson, ‘Holy Asylum Seekers! Tony Abbott to Take Charge of Boat People Hotline’, *Courier Mail*, 16 August 2010, <http://www.couriermail.com.au/archive/news/holy-asylum-seekers-tony-abbott-to-take-charge-of-boat-people-hotline/news-story/c894eb58f9a56b8228a49fe2ce03ea6b>; accessed 16 August 2010.

<sup>57</sup> See, for example, Paul Maley and Stephen Fitzpatrick, ‘Julia Gillard’s Gunboat Diplomacy’, *The Australian*, 8 July 2010, <http://www.theaustralian.com.au/archive/politics/julia-gillards-gunboat-diplomacy/news-story/1c1469a2b9a912445f2745b25d6a4a64>; accessed 8 July 2010.



**Figure 4.3.1: Approval of Government’s handling of asylum seekers in 2003/4 (Howard) and 2009/10 (Rudd).**

Source: Compiled from data presented in Murray Goot and Ian Watson, ‘Population, Immigration and Asylum Seekers: Patterns in Australian Public Opinion’, Parliament of Australia, Parliamentary Library, Pre-Election Policy Unit, May 2011, p. 34.

However, in contrast to the Pacific Solution, the proposed incentives failed to capture the support of the necessary host state. The East Timorese Government bristled at the neo-colonial overtones of the proposal and the lack of proper consultation. Although Gillard had discussed the proposal with the East Timorese head of state (a largely ceremonial role), President Jose Ramos-Horta, and elicited his tentative support before announcing the plan, she had failed to consult the head of government, Prime Minister Xanana Gusmao, a diplomatic disaster and domestic embarrassment. A resolution passed unanimously by the East Timorese parliament in July 2010 categorically rejected the proposal.<sup>58</sup> “This resolution”, the President of the East Timorese parliament declared in July 2010, “shows that we reject our country becoming a rubbish place for refugees”.<sup>59</sup> Nevertheless, with the federal election scheduled for 21 August 2010, the Government continued to pursue its plans for the regional processing centre and, in the absence of other viable options, East Timor

<sup>58</sup> ‘East Timor Parliament Rejects Australia Refugee Plan’, *BBC News Asia-Pacific*, 12 July 2010, <http://www.bbc.co.uk/news/10597025>; accessed 12 July 2010.

<sup>59</sup> Fernando Lasama De Araujo, President of East Timor’s parliament, quoted in Phillip Coorey and Tom Allard, ‘Push for Refugee Centre Will Continue Despite East Timor Rejection’, *Sydney Morning Herald*, 13 July 2010.



remained the focus. Labor only barely emerged victorious from the election, which produced a hung parliament – the first since 1940 – by securing the support of four of the six crossbenchers on confidence and supply. Despite the clear antipathy of the East Timorese towards the proposal, the Gillard Government continued to pursue the concept after the election.

The unrelenting pursuit of a regional processing centre both before and after the election was essentially a concession by Labor that offshore processing – the system it had denounced in Opposition and proudly dismantled after coming to government under Rudd in 2007 – was necessary. Despite the fact that it failed to immediately deter further boat arrivals and to keep those who came by boat from ultimately settling in Australia as discussed in Chapter 1.2 ‘Drawing a Line’, Howard had insisted that the Pacific Solution had been a “resounding success”.<sup>60</sup> “We had regained control over our border protection processes”, he argued, “and the Australian people were in full support of our actions. ... The core of our policy was that we stopped the boats coming. They only returned because the Rudd Government weakened the policy.”<sup>61</sup> This was certainly the view of the public, who had rewarded the Howard Government electorally in both 2001 and 2004 and withdrew their support of Rudd and his Government’s policies as boats increased in 2009-10. It remained the view of the Coalition in Opposition under Abbott, who called incessantly on the Government to “pick up the phone to the President of Nauru and restart offshore processing”.<sup>62</sup> Even some of the staunchest critics of the Howard Government’s asylum seeker policies grudgingly conceded they had worked when boat arrivals, which almost ceased in 2002 after the construction of the Pacific Solution, increased again following its dismantling in early 2008 under Rudd.<sup>63</sup> And now, it would seem, so had the Labor Party

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<sup>60</sup> John Howard, *Lazarus Rising: A Personal and Political Autobiography*, Sydney: Harper Collins, 2010, p. 404.

<sup>61</sup> *Ibid.*

<sup>62</sup> Tony Abbott, *CPD*, HoR, 20 September 2011, p. 10800. In 2012, Abbott boasted that he had extorted the Prime Minister to “pick up the phone to the President of Nauru” on 106 occasions. Abbott, *CPD*, HoR, 14 August 2012, p. 8511.

<sup>63</sup> See, for example, Robert Manne, ‘The Moral Dilemma of Asylum Seeker Policy’, *ABC Religion and Ethics*, 9 November 2010, <http://www.abc.net.au/religion/articles/2010/11/09/3061317.htm?site=northwest>; accessed 31 January 2011; Robert Manne, ‘Australia’s Shipwrecked Refugee Policy: Tragedy of Errors’, *The Monthly*, no. 87, March 2013; Mark Latham, ‘Labor Left Wrong Again’, *Australian Financial Review*, 22 September 2011;

under Gillard, who had once described the Pacific Solution as “costly, unsustainable and wrong as a matter of principal”.<sup>64</sup> But, while fostering a new bipartisan consensus on offshore processing, Gillard still refused to countenance re-opening the existing facilities on Nauru, which was not at this time a signatory of the Refugee Convention (Nauru signed the Convention and Protocol on 17 June 2011), even as the number of boat-borne asylum seekers rose and unrest in the overcrowded onshore facilities grew. Citing the advice of the same experts who had advised Howard, she insisted she would not “waste \$1 billion of taxpayers’ money on an outcome that we have been advised will not work”.<sup>65</sup> Nauru was a willing processing station but not a resettlement option. As noted, most of the refugees who were resettled from Nauru under the Pacific Solution ended up in Australia, many, it was convincingly argued, with psychological damage from their extended incarceration.<sup>66</sup> The Government instead progressively expanded the onshore detention network and the community detention program to accommodate the growing number of asylum seekers as it continued to court East Timor and explore other possible locations for the proposed offshore regional assessment centre.<sup>67</sup>

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Marion Le quoted in Marina Kamenev, ‘Why Does Australia Want to Send Refugees to Malaysia?’, *Time*, 14 June 2011, <http://www.time.com/time/printout/0,8816,2077279,00.html>; accessed 30 May 2013.

<sup>64</sup> Crean and Gillard, ‘Protecting Australia and Protecting the Australian Way’.

<sup>65</sup> Gillard, *CPD*, HoR, 20 September 2011, p. 10800.

<sup>66</sup> See, for example, Zachary Steel, Shakeh Momartin, Derrick Silove, Marianio Coello and Jorge Aroche, ‘Two-Year Psychosocial and Mental Health Outcomes for Refugees Subjected to Restrictive or Supportive Immigration Policies’, *Social Science and Medicine*, vol. 72, 2011, pp. 1149-56; Janette Green and Kathy Eagar, ‘The Health of People in Immigration Detention Centres’, *Medical Journal of Australia*, vol. 192, no. 2, 2010, pp. 65-70; Guy Coffey, Ida Kaplan, Robyn Sampson and Maria Tucci, ‘The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum’, *Social Science and Medicine*, vol. 70, 2010, pp. 2070-9; Pauline McLoughlin and Megan Warin, ‘Corrosive Places, Inhuman Spaces: Mental Health in Australian Immigration Detention’, *Health and Place*, vol. 14, 2008, pp. 254-64; Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momoartin, Bushra Alzuhairi and Ina Susljik, ‘Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees’, *British Journal of Psychiatry*, vol. 188, no. 1, 2006, pp. 58-64; Zachary Steel and Derrick Silove, ‘The Mental Health Implications of Detaining Asylum Seekers’, *Medical Journal of Australia*, vol. 175, no. 11, 2001, pp. 596-9.

<sup>67</sup> A confidential concept paper outlining the Government’s proposed regional assessment centre (RAC) from November 2010 was leaked in February 2011, revealing that East Timor was still the preferred location for the RAC. See Australian Government, ‘Regional Assessment Centre Concept’, November 2010, <https://www.scribd.com/doc/47960788/Regional-Assessment-Centre-Concept>; accessed 7 May 2013.

## **SIEV 221 – a tragedy Australians should not have to witness**

The search for an offshore “solution” to the boat issue was given added urgency by the tragedy of SIEV 221, a small wooden fishing boat carrying 89 mostly Iraqi and Iranian asylum seekers and three Indonesian crew members that perished against the cliffs of Christmas Island on 15 December 2010. The disaster unfolded over a number of hours in front of distraught residents, whose frantic attempts to rescue the passengers were frustrated by the steep terrain and rough conditions. It was recorded by locals and television crews and broadcast widely. More died than were rescued: there were 42 survivors and 50 dead, including 15 babies and children.<sup>68</sup> The footage was shocking and distressing. Speaking of her own reaction to the incident, the Prime Minister suggested that “a lot of Australians are always going to remember where they were when they first saw that come through on the TV news”.<sup>69</sup> It was not the first time people had perished at sea trying to make it into Australia; indeed, just a month earlier a boat carrying almost 100 asylum seekers was reported missing at sea en route to Australia from Indonesia, with all passengers presumed dead.<sup>70</sup> Nor was it the greatest loss of life in a single maritime incident – that undesirable title belonged to the SIEV X disaster, in which 353 people died when the grossly overloaded boat sank on 19 October 2001 in the seas between Java and Christmas Island. But it was the first time ordinary Australians had borne witness to such a tragedy, either in person or via the televised images. Since 2001, when department officials were explicitly instructed that “nothing [was] to be put in the public forum that would humanise these people”,<sup>71</sup> all most

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<sup>68</sup> See Alastair Neil Hope, Western Australia State Coroner, report of the inquest into 30 deaths and 20 suspected deaths in the 2010 Christmas Island disaster, Western Australia Coroners Court, 23 February 2012, [http://www.coronerscourt.wa.gov.au/files/Christmas\\_Island\\_Findings.pdf](http://www.coronerscourt.wa.gov.au/files/Christmas_Island_Findings.pdf); accessed 1 February 2017.

<sup>69</sup> Gillard and Bowen, joint press conference, 13 October 2011.

<sup>70</sup> Jane Hammond, ‘Asylum Boat Feared Missing’, *West Australian*, 25 December 2010. The story of this missing boat and its passengers were later detailed in ‘Details Emerge of Asylum Seekers Lost at Sea’, *Four Corners*, ABC TV, 5 June 2012, <http://www.abc.net.au/news/2012-06-05/details-emerge-of-asylum-seekers-lost-at-sea/4052672>; accessed 10 February 2017. This incident, and all other known deaths associated with Australia’s borders since 1 January 2000, are recorded in the Border Crossing Observatory, Australian Border Deaths Database, last updated 19 October 2016, <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>; accessed 1 February 2017. According to this database there have been at least 1,921 deaths at sea since the beginning of the new millennium.

<sup>71</sup> Jenny McKenry, head of the Department of Defence Public Affairs in 2001, quoted in Tony Jones, ‘Howard Looks Back Without Regrets’, *Lateline*, 7 September 2011, <http://www.abc.net.au/lateline/content/2011/s3312588.htm>; accessed 29 February 2012. Also: Jenny

Australians had seen of the asylum seeker ‘invasion’ against which their Government was battling on their behalf were long shots of industrial ships like the *Tampa* with Royal Australian Navy vessels in the foreground; grainy images showing people allegedly throwing their children into the sea; sabotaged fishing boats ablaze; and regular images of rioting detainees, that is to say, evidence of the ‘un-Australian’ behaviour of ‘barbarous’ people who did not belong and had no place in Australia.<sup>72</sup> There were no close ups of fearful, hopeful faces, no images of bodies floating in the sea, no reports detailing the lives and loves and losses of these people, their occupations and aspirations, their similarities and differences. This left the Australian public largely reliant on the Government to describe and define the boats and their passengers and, on account of the bipartisan approach to asylum seeking and border control, there was little opposition to their depiction as a threat to the health, wealth, and security of Australians. But when SIEV 221 crashed into the cliffs of Christmas Island in full view of residents and camera crews, the fragile humanity of these people who were, like us, vulnerable to rocks and water, crashed into people’s consciousness. Here they were, no longer abstract but desperate, delicate and dying on Australian shores, impossible to ignore. Unlike the SIEV X disaster, which was not regarded, at least officially, as Australia’s responsibility, this was a domestic tragedy, the nation’s worst shipwreck in 115 years. Even so, it was regarded as an Australian tragedy more because of the way the “deeply traumatic event”<sup>73</sup> had impacted upon Australians, on the rescuers, rather than the survivors or the drowned.<sup>74</sup> Certainly, this was the view of the Opposition leader who later chastised the Government for not re-implementing the Howard Government’s policies sooner, arguing

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McKenry quoted in Adrian Raschella, ‘Tampa Revisited’, *The World Today*, ABC Radio, 7 July 2011, <http://www.abc.net.au/worldtoday/content/2011/s3263187.htm>; accessed 4 March 2012.

<sup>72</sup> For example, Immigration Minister Philip Ruddock described lip sewing protests at Woomera in 2002 as foreign and “something which offends the sensitivities of Australians” (Andrew West, ‘Asylum-seeker Teenagers Join Lip Sewing Protest’, *Sun Herald*, 20 January 2002, p. 7). In a joint statement with Ruddock, South Australia Human Services Minister Dean Brown described the same protests as “barbaric” and “unacceptable behaviour in our community”. See Ruddock and Brown, ‘Woomera Children Moved for Protection’, media release, MPS 7/2002, 23 January 2002, <http://pandora.nla.gov.au/pan/67564/20071110-0000/www.minister.immi.gov.au/media/media-releases/2002/r02007.html>; accessed 19 February 2013.

<sup>73</sup> Christmas Island resident quoted in Oliver Laughland, “Everyone Who Was There Was Changed for Life” – Christmas Islanders on the 2010 Boat Sinking Disaster’ [video], *The Guardian*, 13 October 2014, <https://www.theguardian.com/australia-news/video/2014/oct/13/boat-disaster-christmas-island-video>; accessed 1 February 2017.

<sup>74</sup> Linda Briskman and Scott Poynting, ‘Before Getting Practical on Asylum Policy, Let’s Change Our Discourse’, *The Conversation*, 9 August 2013, <https://theconversation.com/before-getting-practical-on-asylum-policy-lets-change-our-discourse-16615>; accessed 28 September 2016.

that Gillard owed an apology “to the people of Australia, who have witnessed the indignities, the trauma and the loss of the last four years”.<sup>75</sup>

There was no national day of mourning for the dead as there was in Italy following the deaths of an estimated 368 Eritreans after their boat sank in seas off Lampedusa in October 2013.<sup>76</sup> Nor did the incident spark an increased search and rescue effort in order to prevent further boat tragedies in the waters surrounding Australia as it did for the Italians.<sup>77</sup> Rather, the incident was used for political point scoring: Shadow Immigration Minister Scott Morrison protested the Government’s decision to hold and pay for the funerals in Sydney, where many of the victims’ families lived,<sup>78</sup> while the Government used the tragedy to justify the dogged pursuit of its proposed regional processing centre. As Gillard explained, “our focus has always been on doing everything we can to deter people from putting themselves in that kind of danger”.<sup>79</sup> However, the East Timorese Government remained ambivalent about hosting the proposed regional processing centre. In January 2011, the East Timorese Deputy Prime Minister Jose Luis Guterres suggested “it would be better to [locate it] in another place instead of Timor-Leste ... Why not in Australia itself, which has an immense territory and available resources?”.<sup>80</sup> The ill-fated plan was finally abandoned in April 2011 when President Ramos-Horta explicitly rejected bilateral talks with Australia on the

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<sup>75</sup> Abbott, *CPD*, HoR, 14 August 2012, p. 8512.

<sup>76</sup> Lizzy Davis, ‘Lampedusa Boat Tragedy is “Slaughter of Innocents” Says Italian President’, *The Guardian*, 4 October 2013, <https://www.theguardian.com/world/2013/oct/03/lampedusa-boat-tragedy-italy-migrants>; accessed 4 October 2013.

<sup>77</sup> In October 2013, after three shipwrecks in the space of just nine days resulting in the loss of more than 500 lives, the Italian Government launched Operation Mare Nostrum, a 12-month search and rescue operation supported by the European Commission’s External Borders Fund. Over the course of the next year, over 150,810 people were rescued at sea by the Italian Navy. See Ralf Drachenberg and Piotr Bakowski, ‘Outcome of the Extraordinary European Council of 23 April 2015’, Post-European Council Briefing, European Parliamentary Research Service, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/547557/EPRS\\_BRI%282015%29547557\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/547557/EPRS_BRI%282015%29547557_EN.pdf); accessed 27 April 2017.

<sup>78</sup> ‘Christmas Island Funerals Anger Relatives’, *ABC News*, 15 February 2011, <http://www.abc.net.au/news/2011-02-15/christmas-island-funerals-anger-relatives/1942970?site=sydney>; accessed 15 February 2011; Lenore Taylor, ‘Morrison Sees Votes in Anti-Muslim Strategy’, *Sydney Morning Herald*, 17 February 2011, <http://www.abc.net.au/news/2011-02-15/christmas-island-funerals-anger-relatives/1942970?site=sydney>; accessed 17 February 2011.

<sup>79</sup> Gillard and Bowen, joint press conference, 13 October 2011.

<sup>80</sup> Mark Dodd, ‘East Timor Says it Straight: No to Asylum Centre’, *The Australian*, 24 January 2011.

proposal.<sup>81</sup> It was an embarrassing failure for the Government but the problem remained – and was growing.

Pressure on the Government came not only from outside with the arrival (or disappearance) of boats, but also from within, as the numbers in immigration detention rose. When the ALP (under Rudd) first came to power at the end of 2007, there were just 247 people in detention.<sup>82</sup> The exponential increase in arrivals from 2009 onwards, which was compounded by the freeze on the processing of Sri Lankan and Afghan refugee claims that was implemented by the Rudd Government in April 2010, overwhelmed the existing facilities and tested the capacity of both the Department of Immigration and Citizenship (DIAC) and the service provider, Serco, to manage the growing immigration detention population. By May 2011, this population had grown to nearly 7,000 people, of whom 65% had been in detention for at least six months and more than one quarter had been detained for 12 months or longer.<sup>83</sup> This resulted in overcrowding, delays in the status determination process and prolonged periods of detention, which, together with the unsatisfactory conditions of their detention, led to “very high levels of distress and frustration, feelings of powerlessness and a pervasive sense of helplessness... and anger” amongst detainees, an already vulnerable population.<sup>84</sup> This was reflected in the level of self-harm (including suicide attempts) among

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<sup>81</sup> ‘Ramos Horta Dents Processing Centre Hopes’, *ABC News*, 29 April 2011, <http://www.abc.net.au/news/2011-04-29/ramos-horta-dents-processing-centre-hopes/2701272>; accessed 24 April 2013.

<sup>82</sup> Allan Hawke and Helen Williams, ‘Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and Villawood Immigration Detention Centre’, 31 August 2011, <http://www.immi.gov.au/media/publications/pdf/2011/independent-review-incidents-christmas-island-villawood-full.pdf>; accessed 19 January 2017, p. 6.

<sup>83</sup> As of 13 May 2011, there were 5,124 people in immigration detention on the mainland and 1,606 on Christmas Island. Department of Immigration and Citizenship (DIAC), ‘Immigration detention statistics summary’, DIAC, <http://www.immi.gov.au/managing-australias-borders/detention/facilities/statistics>; accessed 3 June 2011.

<sup>84</sup> Australian Human Rights Commission (henceforth AHRC), ‘2011 Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood’, May 2011, <http://www.humanrights.gov.au/publications/2011-immigration-detention-villawood>; accessed 19 January 2017, p. 23. In both the 2011 report and its 2008 report on detention, AHRC raised concerns about the physical conditions of Australia’s detention facilities and lack of access to services and activities. AHRC, ‘2008 Immigration Detention Report – Summary of Observations Following the Inspection of Mainland Immigration Detention Facilities’, December 2008, [http://www.humanrights.gov.au/sites/default/files/content/human\\_rights/immigration/idc2008.pdf](http://www.humanrights.gov.au/sites/default/files/content/human_rights/immigration/idc2008.pdf); accessed 2 February 2017. See also Commonwealth Ombudsman (Colin Neave), ‘Suicide and Self-harm in the Immigration Detention Network’, report no. 02/2013, May 2013,

detainees; in just three months between 18 November 2010 and 28 February 2011, 107 self-harm incidents (excluding hunger strikes) were recorded.<sup>85</sup> In the six months between 20 September 2010 and 27 March 2011, there were five apparent suicides in immigration detention, including three in three months at Villawood.<sup>86</sup> It was, as one detainee suggested, “becoming a normal thing”; as another explained, “[e]veryone is in a similar mental state – thinking about dying.”<sup>87</sup> The Government had been warned that these conditions could lead to unrest.<sup>88</sup> However, it responded unsympathetically to protests and riots at Christmas Island in March 2011 and Villawood the following month, refusing to acknowledge the underlying causes for the riots or its own role in the build-up of tension caused by the processing freezes and its failure to meet its own standards as set out in the 2008 policy document, ‘New Directions in Detention’.<sup>89</sup> Instead, the Prime Minister expressed her solidarity with Australians who were angry about the “disturbances... happening in defiance

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[http://www.ombudsman.gov.au/\\_data/assets/pdf\\_file/0022/30298/December-2013-Suicide-and-self-harm-in-the-Immigration-Detention-Network.pdf](http://www.ombudsman.gov.au/_data/assets/pdf_file/0022/30298/December-2013-Suicide-and-self-harm-in-the-Immigration-Detention-Network.pdf); accessed 8 February 2017.

<sup>85</sup> Senate Legal and Constitutional Affairs Committee, ‘Answers to Questions on Notice: Onshore Detention Network’, Immigration and Citizenship portfolio, Additional Estimates 2010—11, 21 February 2011, question 190, [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/estimates/add\\_1011/diac/190.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/estimates/add_1011/diac/190.pdf); accessed 3 June 2011.

<sup>86</sup> Commonwealth Ombudsman, ‘Suicide and Self-harm in the Immigration Detention Network’, p. 38. The New South Wales Coroner criticized the role of DIAC and its contractors, International Health and Medical Services and Serco, in the deaths, which it found to be suicides, at Villawood. See Magistrate Mary Jerram, New South Wales (NWS) Coroner, ‘Findings in the Inquests into the Deaths of Josefa Rauluni, Ahmed Obeid Al-Akabi and David Saunders’, NSW Coroners Court, 19 December 2011, [http://www.lawlink.nsw.gov.au/lawlink/Coroners\\_Court/ll\\_coroners.nsf/vwFiles/VillawoodFindings-redacted.pdf/\\$file/VillawoodFindings-redacted.pdf](http://www.lawlink.nsw.gov.au/lawlink/Coroners_Court/ll_coroners.nsf/vwFiles/VillawoodFindings-redacted.pdf/$file/VillawoodFindings-redacted.pdf); accessed 1 March 2012.

<sup>87</sup> Asylum seekers detained at Villawood quoted in Australian Human Rights Commission, ‘2011 Immigration Detention at Villawood: Summary of Observations from Visit to Immigration Detention Facilities at Villawood’, May 2011, <http://www.humanrights.gov.au/publications/2011-immigration-detention-villawood>; accessed 19 January 2017, p. 22.

<sup>88</sup> The Refugee Council of Australia’s submission to the Government inquiry into the character test amendments points out that a number of individuals and groups, including the Government’s own advisory councils, had warned it of rising tensions due to these conditions and the likelihood of unrest. Refugee Council of Australia, submission to the Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/migration\\_strengthening/submissions.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/migration_strengthening/submissions.htm); accessed 2 June 2011.

<sup>89</sup> For details see Chris Evans, ‘New Directions in Detention - Restoring Integrity to Australia’s Immigration System’, ANU, Canberra, 29 July 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>; accessed 9 September 2008.

of our laws and causing destruction of government property”,<sup>90</sup> while Immigration Minister Chris Bowen empathized with and emphasized the “right [of Australians] to be angry at those who have conducted this sort of damage”.<sup>91</sup> By encouraging and then condoning the public outrage, the Government was helping to perpetuate a self-serving perception of asylum seekers as outsiders who didn’t belong in, and were a threat to, the Australian (gated) community that deflected attention away from its own shortfalls in the management and treatment of asylum seekers and helped to justify their prolonged incarceration and the conditions in which they were being kept.

In response, the Immigration Minister commissioned an independent review of the incidents and introduced legislation to Parliament to toughen the character test in section 501 of the Migration Act, such that anyone convicted of any offence while in immigration detention would automatically fail the character test and could therefore be precluded from obtaining permanent protection in Australia.<sup>92</sup> Those failing the character test but found to have legitimate protection claims would be eligible for a temporary visa only, without the right to sponsor family or to leave from and return to Australia, and with the ever-present possibility of return to their country of origin. “These changes”, Bowen argued, “will...send a strong and clear message that the kind of unacceptable behaviour we saw recently at the Christmas Island and Villawood detention centres will not be tolerated”.<sup>93</sup> But the existing provisions of the Migration Act already allowed the Immigration Minister to make an adverse character finding based on a person’s past criminal or general conduct and anyone convicted of an offence with a sentence of 12 months or more was automatically deemed to have failed the test. The amendments meant that even those convicted of minor, non-violent offences while

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<sup>90</sup> Julia Gillard quoted in ‘Gillard Announces Malaysian Solution’, *Sydney Morning Herald*, 7 May 2011, <http://www.smh.com.au/national/gillard-announces-malaysian-solution-20110507-1ed0h.html>; 22 February 2016.

<sup>91</sup> Chris Bowen, ‘Incidents at Villawood Immigration Detention Centre, Pontville Facility, Refugee Accommodation in Newcastle’, doorstep interview, Newcastle, 21 April 2011, <http://www.minister.immi.gov.au/media/cb/2011/cb164679.htm>; accessed 17 February 2012.

<sup>92</sup> Chris Bowen, ‘Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011’ second reading speech, *CPD*, HoR, 11 May 2011, p. 3509.

<sup>93</sup> Chris Bowen, ‘Tougher Character Test to Send Clear Message’, media release, 26 April 2011, <http://pandora.nla.gov.au/pan/67564/20130204-1043/www.minister.immi.gov.au/media/cb/2011/cb164699.htm>; accessed 19 January 2017.



in the highly pressurized environment of immigration detention (and potentially bystanders caught up in unrest) would also be captured by these ‘deeming provisions’. As the Castan Centre for Human Rights Law noted in their submission to the inquiry, this meant that “[i]mmigration detainees would automatically fail the character test simply because of the location of their offence, rather than the more relevant criterion of the gravity of an offence.”<sup>94</sup> Unnecessary and unnecessarily punitive, the changes to the legislation thus seemed to be designed “to send a clear message” *not* to those who would be affected by the changes but to the voting population, a rhetorical demonstration of the Government’s strength and determination for the benefit of its citizens at the expense of a group of non-citizens. Shadow Immigration Minister Scott Morrison called the Government on what he labelled “a ruse” but noted with satisfaction the way it was “inch[ing] painfully closer every day to the provisions that were put in place by the Howard government”.<sup>95</sup> The legislation was subsequently passed with the support of the Opposition.<sup>96</sup>

#### **“A very different approach” – the Malaysian Arrangement**

On 7 May 2011, however, Gillard announced “a very different approach” to that of the Howard Government, a bilateral arrangement with the Malaysian Government for the transfer, without prior assessment of their refugee claims, of 800 irregular maritime arrivals (IMAs) from Australia to Malaysia, where they would effectively go to the back of the refugee assessment and resettlement “queue”.<sup>97</sup> The “queue” was substantial: there were nearly 100,000 people registered with UNHCR in Malaysia at the end of 2011, including

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<sup>94</sup> Sarah Joseph and Azadeh Dastyari, Castan Centre for Human Rights Law, Monash University, submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011, 31 May 2011, [http://www.aph.gov.au/senate/committee/legcon\\_ctte/migration\\_strengthening/submissions.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/migration_strengthening/submissions.htm); accessed 1 June 2011.

<sup>95</sup> Morrison, *CPD*, HoR, 30 May 2011, p. 5046.

<sup>96</sup> Chris Bowen, ‘Character Test Changes Passed by Parliament’, media release, 5 July 2011, <http://www.minister.border.gov.au/media/cb/2011/cb167979.htm>; accessed 3 January 2013.

<sup>97</sup> Julia Gillard, joint press conference with Chris Bowen, Canberra, 7 May 2011, <http://www.pm.gov.au/node/6884>; accessed 20 January 2017; Julia Gillard, joint statement with the Prime Minister of Malaysia, 7 May 2011, <http://www.pm.gov.au/press-office/joint-statement-prime-minister-malaysia>; accessed 9 May 2011.

85,754 recognised refugees, from which just 8,370 were resettled in third countries in 2011.<sup>98</sup> In exchange, Australia would accept 4,000 refugees from Malaysia for resettlement over four years, on top of the existing humanitarian intake (i.e. an additional 1,000 humanitarian places devoted to refugees from Malaysia per year).<sup>99</sup> Returning boat arrivals to where many had begun their journey, the Government argued, would discourage asylum seekers from embarking on dangerous boat voyages in the first place. It would “break the back of the people smuggling model” by taking “away from them the very product that they sell” while increasing protection opportunities for “genuine refugees”.<sup>100</sup>

The transfer and resettlement arrangement with Malaysia won the cautious support of UNHCR, who noted its potential to disrupt people smuggling thereby reducing the risk of deaths at sea, and to enhance the management of asylum seeker flows and refugee protection both in Australia and Malaysia, as well as the region more broadly.<sup>101</sup> Despite its firm preference for onshore processing of asylum seekers arriving to Australia by boat, the agency applauded the additional resettlement places that would be offered by Australia to refugees from Malaysia as a *burden-sharing* initiative that might form the basis of a regional cooperation framework.<sup>102</sup> This stood in contrast to the *burden shifting* that had been a hallmark of the Pacific Solution. As already noted, while Malaysia had a sizeable refugee and asylum seeker population (amongst a much bigger population of illegal migrants with whom

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<sup>98</sup> Gerhard Hoffstaedter, ‘Refugees and Asylum Seekers in Malaysia: The Good, the Bad and the Unexpected’, *The Conversation*, 31 July 2012, <http://theconversation.com/refugees-and-asylum-seekers-in-malaysia-the-good-the-bad-and-the-unexpected-8532>; accessed 16 June 2013. See Table 1, Refugees, asylum-seekers, internally displaced persons (IDPs), returnees (refugees and IDPs), stateless persons, and others of concern to UNHCR by country/territory of asylum, end of 2011, in UNHCR, *A Year of Crises: UNHCR Global Trends 2011*, UNCHR, Geneva, 2012, p. 39, <http://www.unhcr.org/en-au/statistics/country/4fd6f87f9/unhcr-global-trends-2011.html>; accessed 13 June 2012.

<sup>99</sup> Chris Bowen, ‘Budget 2011-12: Boost to Australia’s Humanitarian Program’, media release, 10 May 2011, <http://pandora.nla.gov.au/pan/67564/20130204-1043/www.minister.immi.gov.au/media/cb/2011/cb165279.htm>; accessed 19 January 2017.

<sup>100</sup> Gillard, joint press conference with Bowen, Canberra, 7 May 2011.

<sup>101</sup> UNHCR Communications Group, ‘UNHCR Statement on the Australia-Malaysia Arrangement’, media release, 25 July 2011, <http://www.unhcr.org/en-au/news/press/2011/7/4e2d21c09/unhcr-statement-australia-malaysia-arrangement.html?query=malaysia>; accessed 24 January 2013; Yante Ismail, UNHCR spokesperson, quoted in Steve Pennells, ‘Refugee Deal Offers Fresh Hope for Widow’, *The Age*, 16 May 2011, p. 6.

<sup>102</sup> Richard Towle, UNHCR regional representative, cited in Samantha Donovan, ‘UNHCR Welcomes Malaysia Refugee Deal’, *The World Today*, ABC, 9 May 2011, <http://www.abc.net.au/news/2011-05-09/unhcr-welcomes-malaysia-refugee-deal/2705796>; accessed 9 May 2011.

they were conflated), this had not been the case for either Nauru or Papua New Guinea (PNG), whose cooperation had been elicited by financial enticements rather than any potential dividends in terms of asylum seeker management. (Australia was to cover all costs associated with the Malaysian Arrangement but there were no added financial incentives.) Also in contrast to the Pacific Solution, which had been an Australian-run operation, UNHCR agreed to be involved in the administration of the arrangement together with the International Organisation for Migration. The arrangement was formally entered into on 25 July 2011.

Despite the tentative support and involvement of UNHCR, Labor's "ground-breaking new arrangement"<sup>103</sup> was widely condemned by other refugee organisations and advocates who argued that it "not only undermine[d] protection principles and place[d] vulnerable groups at risk, but also sends a clear message to the region that Australia does not respect the binding nature of its international legal obligations towards asylum-seekers and refugees".<sup>104</sup> The primary source of contention was the fact that Malaysia was not a signatory to the UN Refugee Convention, which had been a key ALP criticism of the Coalition's policies during the Howard era and underpinned its refusal to reopen offshore processing facilities on Nauru.<sup>105</sup> Malaysia was not, therefore, bound by the same international standards as Australia for the treatment of asylum seekers and refugees. Indeed, while Malaysia allowed UNHCR to operate within its territory, there was no domestic legislative and administrative framework for registering or determining refugee claims.<sup>106</sup> Refugees and asylum seekers in Malaysia had no legal status – they were regarded as illegal immigrants – and, as such, no work or

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<sup>103</sup> Julia Gillard, joint statement with the Prime Minister of Malaysia, 7 May 2011, <http://www.pm.gov.au/press-office/joint-statement-prime-minister-malaysia>; accessed 9 May 2011.

<sup>104</sup> NGO Statement on General Debate, Agenda Item 4, Executive Committee of the High Commissioner's Programme, 62<sup>nd</sup> meeting, 3-7 October 2011, <http://www.unhcr.org/en-au/excom/announce/4e969c869/ngo-statement-general-debate-62nd-session-unhcr-executive-committee-3-7.html?query=malaysia>; accessed 25 January 2017.

<sup>105</sup> See, for example, Michelle Foster, 'Troubled Waters Lie Ahead', *The Age*, 17 May 2011, p. 13; Bill Frelick, Refugee Program Director, and Brad Adams, Asia Division Executive Director, Human Rights Watch, letter to António Guterres, United Nations High Commissioner for Refugees, regarding the Refugee/Asylum Seeker Exchange Agreement between Australia and Malaysia, 13 June 2011, <https://www.hrw.org/print/243209>; accessed 25 January 2016.

<sup>106</sup> Savitri Taylor, 'Regional Cooperation and the Malaysian Solution', *Inside Story*, 9 May 2011, <http://inside.org.au/regional-cooperation-and-the-malaysian-solution>; accessed 23 June 2011; Frelick and Adams, letter to António Guterres.

education rights. With no direct support for housing and food from either the Malaysian Government or UNHCR, they were forced to rely on non-governmental organisations and/or resort to illegal housing and work at the risk of detection, prosecution, imprisonment, caning and deportation for immigration offences and faced harassment and rent-seeking from authorities.<sup>107</sup> The absence of protections for refugees in Malaysia thus raised concerns about Australia's non-*refoulement* obligations under the Refugee Convention, that is, the responsibility not to expel or return a refugee to danger, which it was effectively outsourcing to a country that was under no legally binding commitments to uphold them. Although the Australian Government pointed to the non-*refoulement* clauses that it had "painstakingly negotiated",<sup>108</sup> the Arrangement was not legally binding. It was merely "a record of the Participants' intentions and political commitments",<sup>109</sup> and these protections were therefore unenforceable. Refugee law expert Savitri Taylor points out that since Australia's non-*refoulement* obligation "is engaged the moment [a refugee] comes within Australia's territorial or other jurisdiction", it therefore risked breaching this obligation by sending an asylum seeker to another country that might subsequently deport them to danger.<sup>110</sup>

While some questioned the reliability of the promised protections for transferees, other critics expressed concerns that such protections could create a problematic dual class of refugees and asylum seekers in Malaysia – of those who came under the protection of the agreement with Australia and those who did not – and that the protections afforded to the transferees from Australia (which included work rights) might continue to provide incentive for asylum seekers to take to boats.<sup>111</sup> Rather than improving the treatment of refugees and

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<sup>107</sup> See UNHCR, *2010 Global Report*, 20 June 2011, <http://www.unhcr.org/en-au/publications/fundraising/4dfdbf5516/unhcr-global-report-2010-malaysia.html?query=malaysia>; accessed 25 January 2017, p. 267; Hoffstaedter, 'Refugees and Asylum Seekers in Malaysia'.

<sup>108</sup> Chris Bowen, *CPD*, HoR, 20 September 2011, pp. 10803-4.

<sup>109</sup> Chris Bowen, Arrangement Between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, media release, 25 July 2011, [http://www.minister.border.gov.au/media/media-releases/\\_pdf/20110725-arrangement-malaysia-aust.pdf](http://www.minister.border.gov.au/media/media-releases/_pdf/20110725-arrangement-malaysia-aust.pdf); accessed 25 July 2011.

<sup>110</sup> Taylor, 'Regional Cooperation and the Malaysian Solution'.

<sup>111</sup> See, for example, Amnesty International Australia spokesperson Graham Thom in Ben Packham and Joe Kelly, 'Human Rights Groups Attack Malaysia Refugee Swap Deal', *The Australian*, 26 July 2011, <http://www.theaustralian.com.au/national-affairs/labors-blank-cheque-for-malaysian-refugee-deal/news->

asylum seekers more broadly in Malaysia, it was also feared that the agreement might exacerbate Malaysia's poor treatment of refugees and asylum seekers not under Australian protections so as to avoid becoming seen as a popular pathway to Australia and thereby attracting more refugees and asylum seekers into the resettlement 'waiting room'. Additionally, there were concerns that women and children might be included amongst the transferees; conversely, if they were not, that this arrangement might encourage more women and children to undertake dangerous boat voyages to Australia (as the TPV restrictions had done under Howard).<sup>112</sup> The subsequent announcement that the transfer arrangement *would* apply to unaccompanied minors drew fierce criticism from the Opposition<sup>113</sup> and also internal dissent with a 14-strong group of state Labor MPs in WA signing a petition against the plan.<sup>114</sup> Some refugee advocates, including Marion Le and prominent refugee lawyer Julian Burnside, expressed their preference for the Opposition's plan to re-open Nauru above the Government's Malaysian Arrangement, arguing that asylum seekers and refugees would receive better treatment in Australian-run offshore facilities than they would on their own in Malaysia.<sup>115</sup> Moreover, it was unclear what would happen should boat arrivals to Australia exceed the quota for transferees and also what would happen to any transferred asylum seekers who were not subsequently found by UNHCR to have a valid claim but could not be returned to their country of origin and would thus be classified as illegal migrants in Malaysia.<sup>116</sup>

Gillard's Malaysian solution was thwarted in the first instance by the High Court, which, in a challenge to the legal basis of the arrangement, ruled in favour of an Afghan asylum seeker

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[story/1872819be7213b8873b7c8f4db016153](http://www.theaustralian.com.au/national-affairs/labor-urged-to-revive-pacific-solution-by-refugee-activists/story-fn59niix-1226069001374); accessed 26 July 2011; Bill Frelick, Refugee Program Director, and Brad Adams, Asia Division Director, Human Rights Watch, letter to the Prime Ministers of Australia and Malaysia regarding the Australia-Malaysia Transfer and Resettlement Arrangement, 26 July 2011, <https://www.hrw.org/news/2011/07/26/letter-prime-ministers-australia-and-malaysia-regarding-australia-malaysia-transfer>; accessed 6 February 2017.

<sup>112</sup> See, for example, Joe Hockey, *CPD*, HoR, 27 June 2012, p. 8286; Tony Abbott, *CPD*, HoR, 27 June 2012, p. 8236.

<sup>113</sup> See, for example, Joe Hockey, *CPD*, HoR, 27 June 2012, p. 8286.

<sup>114</sup> Matthew Franklin and Lanai Vasek, 'Labor Urged to Revive Pacific Solution By Refugee Advocates', *The Australian*, 4 June 2011, <http://www.theaustralian.com.au/national-affairs/labor-urged-to-revive-pacific-solution-by-refugee-activists/story-fn59niix-1226069001374>; accessed 5 May 2015.

<sup>115</sup> *Ibid.*

<sup>116</sup> Frelick and Adams, letter to António Guterres.

who had arrived to Christmas Island – an excised offshore place – aboard SIEV 258. This was the first boat to arrive after the signing of the Malaysian Arrangement and was thus subject to the Government’s new arrangement.<sup>117</sup> The legal basis for the Malaysian transfer arrangement was provided by the amendments that had been inserted into the Migration Act by the Howard Government in order to enact the Pacific Solution in 2001 and left there by the Rudd Government, even after it decommissioned the offshore processing facilities in 2008. Section 198A(1) of the Migration Act allowed for the transfer of “offshore entry persons” from Australia to any country declared in writing by the Minister for Immigration to meet the criteria set out in section 198A(3), namely, that the specified country provide access to effective refugee status assessment procedures and protection that meets relevant human rights standards for asylum seekers pending the outcome of their status and while awaiting voluntary repatriation or resettlement.<sup>118</sup> Legal expert Savitri Taylor explains that both the Gillard and the Howard Governments’ understanding of the law was that the Minister’s declaration of a country as ‘safe’ for asylum seekers did not have to be true as long as the minister *believed* it to be true.<sup>119</sup> According to the Government, it was “the existence of the minister’s declaration itself, not the truth of the content of that declaration, that engages the operation of s198A(1)”. The Immigration Minister had provided the court with an sworn affidavit in which he stated his conviction that the Malaysian Government “was keen to improve its treatment of refugees and asylum seekers” and “had made a significant conceptual shift in its thinking about how it wanted to treat refugees and asylum seekers and had begun the process of improving the protections it offered”.<sup>120</sup> However, the High Court

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<sup>117</sup> The plaintiff, M70, who arrived after the Arrangement between Australia and Malaysia commenced, was amongst the first group of asylum seekers to be transferred to Malaysia. After an injunction was issued on 8 August 2011 preventing the transfer of this group from Christmas Island to Malaysia, a hearing in front of the Full Bench of the High Court was scheduled to decide on the legality of the Arrangement. Since Section 486B(4) of the *Migration Act* prohibits joint actions in migration proceedings, one adult (M70) and one minor (M106) were selected on behalf of this group and to effectively represent all IMAs arriving after the 25 July 2011 who would be subject to the Arrangement. High Court of Australia, Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship, ([2011] HCA 32), 31 August 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html>; accessed 24 January 2012.

<sup>118</sup> *Migration Act*, s. 198A(3).

<sup>119</sup> Savitri Taylor, ‘Wicked Problems and Good Intentions’, *Inside Story*, 20 August 2012, <http://insidestory.org.au/wicked-problems-and-good-intentions/>; accessed 23 January 2017.

<sup>120</sup> Chris Bowen, affidavit, 14 August 2011, cited in High Court of Australia, Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship, ([2011] HCA 32), 31 August 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html>; accessed 24 January 2012.

found this to be insufficient, insisting that a declared country must be legally bound by either domestic law or international law to provide the necessary protections to refugees and asylum seekers.<sup>121</sup> The satisfaction of these standards and obligations could not be subject to an opinion formed in good faith by the Minister but rather needed to be “a matter of objective fact to the satisfaction of a court”.<sup>122</sup> It ruled that the Minister’s declaration of Malaysia as a “declared country” for the purpose of transferring “offshore entry persons” was invalid because, amongst other things, it was not signatory to the Refugee Convention, it did not conduct processing of asylum seeker claims, and there was no legally binding arrangement with Australia obliging it to provide the protections required by the UN Convention.<sup>123</sup> The Court’s decision also effectively ruled out Nauru, despite its recent accession to the Refugee Convention and Protocol, as well as PNG (a signatory – with numerous reservations – of both the Convention and Protocol since 1986, but with no domestic refugee determination procedure). The Government had recently signed a Memorandum of Understanding with the PNG Government with a view to establishing a refugee assessment centre that would “complement the Malaysia transfer arrangement and provide further disincentive for people considering risking their lives on dangerous boat journeys”.<sup>124</sup> According to the Solicitor-General’s advice, being party to the Convention was not, on its own, sufficient to satisfy the criteria in section 198A(3) for invoking section 198A; declared countries needed to be able to demonstrate “practical compliance” with their obligations under the Convention and Protocol and relevant human rights standards.<sup>125</sup>

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<sup>121</sup> *Ibid.*

<sup>122</sup> Solicitor-General Stephen Gageler and Senior Counsels Stephen Lloyd and Geoffrey Kennett, In the Matter of the Implications of *Plaintiff m70/2011 V Minister for Immigration and Citizenship* for Offshore Processing of Asylum Seekers Under the *Migration Act 1958 (Cth)*, SG no. 21 of 2011, 2 September 2011, <http://resources.news.com.au/files/2011/09/04/1226129/101737-solicitor-general-advice.pdf>; accessed 6 February 2017.

<sup>123</sup> See High Court of Australia, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship*, ([2011] HCA 32), 31 August 2011, <http://www.austlii.edu.au/au/cases/cth/HCA/2011/32.html>; accessed 24 January 2012.

<sup>124</sup> Chris Bowen, ‘Australia and Papua New Guinea Sign MoU’, media release, 24 October 2011, <http://www.minister.border.gov.au/media/cb/2011/cb170699.htm>; accessed 3 January 2013.

<sup>125</sup> Gageler, Lloyd and Kennett, In the Matter of the Implications of *Plaintiff m70/2011 V Minister for Immigration and Citizenship*.

Curiously, there was, in fact, substantial support amongst the public at this time for the onshore processing of asylum claims. A Nielsen poll in August found that a majority (53%) of voters were in favour of assessing the claims of IMAs in Australia. Only 28% supported their removal to third countries for processing, while 15% were in favour of pushing boats “back out to sea”.<sup>126</sup> Nonetheless, the Government was determined to “see this issue through”.<sup>127</sup> It claimed that the announcement of the Malaysian Arrangement alone had seen a reduction in boat arrivals,<sup>128</sup> a claim that was ostensibly supported by data: in the six months following the announcement of the plan, there were, on average, 281 IMAs per month, compared to 448 per month in the 12 months prior to the announcement.<sup>129</sup> It thus introduced legislation in September that sought to repeal the problematic section 198A.<sup>130</sup> However, the legislation failed to gain the necessary support from the Greens, who opposed offshore processing, or from the Opposition, who having “invented” it, claimed “the patent on offshore processing” and supported its re-establishment on Nauru only.<sup>131</sup> The Coalition therefore refused to support the Government’s proposed amendments that would have allowed for the transfer of asylum seekers to Malaysia, which it labelled “offshore dumping”,<sup>132</sup> as well as providing the legal basis required to re-establish offshore processing

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<sup>126</sup> Phillip Coorey, ‘Voters Reject Refugee Plans of Both Parties’, *Sydney Morning Herald*, 16 August 2011, <http://www.smh.com.au/national/voters-reject-refugee-plans-of-both-parties-20110815-1iuwe.html>; accessed 24 June 2012.

<sup>127</sup> Chris Bowen quoted in Lawrence Dimech, ‘Politics of Fear and Boat People’, *Times of Malta*, 16 September 2011, <http://www.timesofmalta.com/articles/view/20110916/opinion/Politics-of-fear-and-boat-people.384914>; accessed 21 February 2012.

<sup>128</sup> Gillard and Bowen, joint press conference, 13 October 2011.

<sup>129</sup> Calculated from DIAC data supplied to Marg Hutton by Cath Wilson (Assistant Secretary, Immigration Intelligence Branch, DIAC) and Don Smith (National Manager, Counter Maritime People Smuggling Taskforce, Australian Customs and Border Control Protection Service), <http://sievx.com/dbs/boats/SIEVS1to374.pdf>; accessed 27 January 2015.

<sup>130</sup> Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011, which was introduced into Parliament on 21 September 2011. The legislation would replace the destination for offshore entry persons with “an offshore processing country” designated in writing by the Immigration Minister. Instead of requiring refugee protection, the only condition would be that the Minister believed the designation of an offshore processing country to be in the national interest and that the designated country provide assurances – not necessarily legally binding – that it would make refugee status determinations and not refole refugees to danger. Taylor points out that this legislation would have permitted the Minister to designate an offshore processing country even in the absence of these assurances. Taylor, ‘Wicked Problems and Good Intentions’.

<sup>131</sup> Tony Abbott, ‘Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011’ second reading speech, *CPD*, HoR, 22 September 2011, p. 11166.

<sup>132</sup> *Ibid.*



on Nauru and PNG. The Opposition argued that Malaysia, as a non-signatory to the Convention, could not provide sufficient protections to the transferees: “their standards are not our standards... and our responsibility with the people who have come into our care is to ensure that the standards they are going to are acceptable to us”.<sup>133</sup> The hypocrisy of the Coalition’s position was astonishing since its preferred options included offshore processing on Nauru, only a recent signatory to the Convention, which was not yet enshrined in its domestic law, and the turning back of boats to Indonesia, which was not party to the Convention and, like Malaysia, had a poor human rights record. But this position was also callously practical: the Coalition had no interest in seeing the ALP implement a successful solution, even if it was modelled on their own, since, as a key Liberal strategist reportedly stated, the boats issue was “fantastic” for the Opposition and “the more that came the better”.<sup>134</sup> The Bill was abandoned in October. The Government promised to honour the 4,000 resettlement places for refugees from Malaysia over four years regardless, however this was to come out of the existing refugee resettlement quota rather than in addition to it as initially proposed, thus rescinding the only “protection enhancing”<sup>135</sup> element of the plan.

### **Dying to come in**

Despite the bipartisan consensus on offshore processing, the legislative impasse meant that onshore processing continued by default, even though both major parties now believed it would increase the number of people willing to undertake perilous sea voyages to Australia. Each blamed the other for every subsequent boat arrival, the Opposition once again taunting Gillard with the jibe she had used as Shadow Immigration Minister during the Howard era: “another boat, another policy failure”.<sup>136</sup> A further 32 boats arrived by the end of 2011,

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<sup>133</sup> *Ibid.*, pp. 11166-7.

<sup>134</sup> A key Liberal party strategist to US diplomats in November 2009, quoted in Philip Dorling, ‘US Critical of Rudd’s Handling of Asylum Seekers’, *The Age*, 16 December 2010, <http://www.theage.com.au/national/us-critical-of-rudds-handling-of-asylum-seekers-20101215-18y7c.html>; accessed 3 February 2012.

<sup>135</sup> Savitri Taylor, ‘The Demise of the Malaysian Solution’, <https://www.latrobe.edu.au/news/articles/2011/opinion/the-demise-of-the-malaysian-solution>; accessed 25 January 2017.

<sup>136</sup> Abbott, *CPD*, HoR, 13 September 2011, p. 9896.

carrying a total of 2,382 asylum seekers.<sup>137</sup> In order to accommodate these arrivals, the Government expanded the community detention program for children, families and other vulnerable individuals, commissioned two new detention facilities and began issuing bridging visas for low-risk asylum seekers to live and work in the community while their claims were processed.<sup>138</sup> After a boat foundered off the coast of Java in November 2011 and 30 of its 75 passengers drowned, the Government offered to negotiate in private with the Opposition and to recall Parliament in order to break the legislative impasse.<sup>139</sup> Abbott refused. Following a second disaster in December, almost exactly a year after the Christmas Island tragedy, with an even greater loss of life – 201 of 250 people aboard the *Barokab* perished off East Java – even former Howard ministers Philip Ruddock and Alexander Downer supported a compromise deal that would allow the Government to go ahead with the Malaysian Arrangement.<sup>140</sup> However, despite growing dissent amongst Coalition ranks, Abbott refused to budge while the issue continued to damage the Government, with Morrison insisting, “[t]here is nothing to negotiate” and claiming that Labor had “super-sized” the problem by releasing boat people into the community.<sup>141</sup> In the meantime, the Government introduced a single statutory protection visa process for irregular maritime arrivals and air arrivals (that is to say, the mode of arrival became irrelevant to protection visa applications and access to independent merits review through the Refugee Review Tribunal),

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<sup>137</sup> 2,382 asylum seekers arrived by boat between 1 September 2011 and 31 December 2011. Calculated from DIAC data supplied to Marg Hutton by Cath Wilson (Assistant Secretary, Immigration Intelligence Branch, DIAC) and Don Smith (National Manager, Counter Maritime People Smuggling Taskforce, Australian Customs and Border Control Protection Service), <http://sievx.com/dbs/boats/SIEVS1to374.pdf>; accessed 27 January 2015.

<sup>138</sup> Gillard and Bowen, joint press conference, 13 October 2011; Julia Gillard and Chris Bowen, ‘Government to Move Children and Vulnerable Families into Community-Based Accommodation’, media release, 18 October 2010, <http://pmtranscripts.pmc.gov.au/release/transcript-17437>; accessed 12 January 2017; Chris Bowen, ‘Bridging Visas To Be Issued For Boat Arrivals’, media release, 25 November 2011, <http://www.chrisbowen.net/media-centre/media-releases.do?newsId=5240>; accessed 20 February 2012.

<sup>139</sup> Chris Bowen, doorstep interview, Sydney, 20 December 2012, <http://pandora.nla.gov.au/pan/67564/20120320-0000/www.minister.immi.gov.au/media/cb/2011/cb181479.htm>; accessed 10 February 2017.

<sup>140</sup> Lenore Taylor and Kirsty Needham, ‘Malaysian Plan Still Possible, Says Ruddock’, *Sydney Morning Herald*, 21 December 2011, <http://www.smh.com.au/action/printArticle?id=2851273>; accessed 24 January 2012; Martin McKenzie-Murray, ‘Enough is Enough on Asylum Seeker Politics’, *The Age*, 23 December 2011, <http://www.theage.com.au/action/printArticle?id=2855237>; accessed 5 January 2012.

<sup>141</sup> Morrison quoted in Nick Bryant, ‘Scott Morrison: So Who the Bloody Hell Are You?’, *The Monthly*, February 2012, <http://www.themonthly.com.au/issue/2012/february/1328593883/nick-bryant/so-who-bloody-hell-are-you>; accessed 19 November 2014.

but left in place the “excision architecture” with a view to reinstating the non-statutory process for IMAs should the Opposition provide the necessary legislative support for offshore processing to resume.<sup>142</sup>

The situation was brought to a head, ironically enough, during Refugee Week in June 2012, when a boat bearing more than 200 mostly Afghan asylum seekers sank in the Indian Ocean en route to Christmas Island and some 90 people drowned. In the wake of this “dreadful human tragedy”,<sup>143</sup> Gillard reaffirmed the Government’s compromise offer to re-open Nauru and commission an inquiry into the efficacy of temporary protection visas as well as pursuing an arrangement with Malaysia if the Migration Legislation Amendment (The Bali Process) Bill 2012 was passed.<sup>144</sup> The compromise Bill had been introduced in February by independent Rob Oakeshott as a “circuit breaker” that would enable offshore processing of asylum seekers in any of the 48 countries who were members of the Bali Process, which was established in 2002 to work towards a regional solution to people smuggling in the Asia Pacific.<sup>145</sup> This included Malaysia and Indonesia as well as Nauru. The sinking of yet another asylum seeker boat, believed to be carrying 150 asylum seekers and resulting in at least four deaths, less than a week after the last prompted extended and emotional debate and extraordinary scenes in Parliament as the Coalition desperately tried to reign in MPs threatening to side with the Government to pass the Bill.<sup>146</sup> The Bill (with a 12-month sunset clause inserted by independent Andrew Wilkie) ultimately passed the House with the support of crossbenchers but, with the Coalition unmoved in its position on the Malaysian Arrangement, and the Greens unrelenting in their opposition to offshore processing under any circumstances, it was rejected by the Senate the next day.

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<sup>142</sup> Bowen, ‘Bridging Visas To Be Issued For Boat Arrivals’.

<sup>143</sup> Gillard, *CPD*, HoR, 25 June 2012, p. 7658.

<sup>144</sup> Gillard, *CPD*, HoR, 26 June 2012, p. 7978.

<sup>145</sup> Migration Legislation Amendment (The Bali Process) Bill 2012. See Rob Oakeshott, *CPD*, HoR, 13 February 2012, p. 803.

<sup>146</sup> Katharine Murphy, ‘Politics Wrap: June 27, 2012’, *Sydney Morning Herald*, 27 June 2012, <http://www.smh.com.au/opinion/politics/blogs/the-pulse/politics-wrap-june-27-2012-20120627-2118r.html?reload=true>; accessed 27 June 2012.

## Houston, we have a problem

With a view to either forcing the Coalition's hand on a compromise solution or, alternatively, preparing a path for another otherwise politically embarrassing retreat on her staunch refusal to "pick up the phone to the President of Nauru", Gillard immediately convened an independent panel of experts to advise the Government and "the nation about the best way forward for our nation in dealing with asylum seeker issues".<sup>147</sup> The panel was led by former Defence Force Chief, Angus Houston, together with one-time refugee and Director of the Victorian Foundation for Survivors of Torture, Paris Aristotle, and Professor Michael L'Estrange, Director of the ANU National Security College and former head of foreign affairs under Howard. The expert panel was specifically asked to advise on "how best to prevent asylum seekers risking their lives by travelling to Australia by boat" and to provide the necessary legislative and budgetary measures.<sup>148</sup> It reported back to the Government six weeks later, on 13 August 2012, with an integrated set of 22 recommendations for the long, medium and short term that, the panel advised, needed to be applied in a comprehensive way in order to be effective in shifting "the balance of risk and incentive in favour of regular migration pathways".<sup>149</sup> The Government endorsed, in principle, all of the panel's recommendations, which included increasing the humanitarian program from 13,750 places to 20,000 immediately (and potentially to 27,000 within five years), with at least 12,000 – double the existing allocation – of those places being allocated to the refugee component; allocating more resettlement places for refugees residing in South-East Asia (a region characterized by low subscription to the Refugee Convention) and in Indonesia and Malaysia in particular; and urgently introducing offshore processing legislation and establishing capacity in both Nauru and PNG as soon as possible in order to provide a "circuit breaker to the current surge in irregular migration to Australia".<sup>150</sup> The panel did not reject the Government's Malaysian Arrangement as such but recommended strengthening safeguards

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<sup>147</sup> Julia Gillard, press conference, 28 June 2012, <https://pmtranscripts.pmc.gov.au/release/transcript-18654>; accessed 16 April 2017.

<sup>148</sup> See Terms of Reference in Angus Houston, Paris Aristotle and Michael L'Estrange, *Report of the Expert Panel on Asylum Seekers*, Australian Government, Canberra, August 2012, [http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert\\_panel\\_on\\_asylum\\_seekers\\_full\\_report.pdf](http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf); accessed 20 August 2012.

<sup>149</sup> Houston, Aristotle and L'Estrange, *Report of the Expert Panel on Asylum Seekers*, p. 8.

<sup>150</sup> *Ibid.*

and accountability before it be implemented. Nor did it rule out the Coalition's proposal of turning back boats at sea if and when they could be conducted effectively, lawfully and safely but made it clear that these conditions were not presently satisfied.

It did, however, recommend reviewing two Howard-era policy innovations. Upon coming to power in 1996, the Howard Government shifted family reunion concessions for refugee proposers from the migration program into the humanitarian program, masking an effective reduction to the latter (as explained in Chapter 4.1 'We Will Decide').<sup>151</sup> It also linked the onshore (asylum) and offshore (resettlement) intakes so that resettlement places for onshore refugee applicants were drawn from the same allocation as, and thus came at the expense of, the special humanitarian program (SHP) (refer to Table 1.1.1 in Chapter 1.1).<sup>152</sup> The SHP had been established in 1981 to offer protection to people who were subject to substantial discrimination or significant violation of human rights in their homelands but did not meet either the refugee or ordinary migrant selection criteria and could demonstrate a personal connection to Australia via close relatives, former ties, or a well established community able and willing to provide settlement support.<sup>153</sup> It thus served as a family reunion pathway for relatives of refugees in Australia. The Howard Government's coupling of the onshore and offshore intakes in this way was subsequently maintained and defended by Labor, who argued that it allowed the Government to accurately budget for the humanitarian program.<sup>154</sup> But the steep increase in IMAs during Labor's term had resulted in a massive backlog of SHP applications. The panel estimated this could result in family reunion delays of twenty years or more, which increased the incentive for family members to attempt irregular migration (just as temporary protection visas had under Howard). It thus suggested reviewing the linkage between the onshore and offshore programs within two years and

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<sup>151</sup> See Katrina Stats, 'We Will Decide: Refugee and Asylum Policy during the Howard Era before Tampa', *Australian Studies*, vol. 7, 2015, p. 3.

<sup>152</sup> Philip Ruddock, '1996-7 Humanitarian Program', media release, 3 July 1996, MPS 28/96, <http://www.minister.immi.gov.au/media/media-releases/1996/r96028.htm>; accessed 14 July 2012.

<sup>153</sup> Ian Macphee, 'Ministerial Statement – Special Humanitarian Program', *CPD*, HoR, 18 November 1981, pp. 3067-9.

<sup>154</sup> Chris Bowen cited in Cameron Stewart, 'Boats Sinking Our Refugee Program', *The Australian*, 21 July 2012, <http://www.theaustralian.com.au/national-affairs/opinion/boats-sinking-our-refugee-program/news-story/55755621cfa91cdb881f592249db0a50>; accessed 21 July 2012.

recommended that family reunion for IMAs be channeled through the migration program, reserving the SHP pathway for family members of refugees who arrived in Australia via the offshore resettlement program. In addition to reducing the backlog, the purpose of this recommendation was not to prevent family reunion for IMAs (as had been the case with TPV) but to remove any advantage gained by arriving irregularly by boat. The principle of “no advantage” – that unauthorised arrivals should gain no benefit over refugees awaiting resettlement in offshore locations – was, according to the panel, “[t]he single most important priority in preventing people from risking their lives on dangerous maritime voyages”.<sup>155</sup>

The Government acted quickly on many of the panel’s recommendations. “No advantage” was, as noted, something Gillard had herself championed as Shadow Immigration Minister in 2002 and was central to the Malaysian Arrangement.<sup>156</sup> The Government thus adopted it enthusiastically, spreading its new slogan from Rarotonga to Vladivostok and everywhere in between.<sup>157</sup> It increased the humanitarian program to 20,000 places in August and committed to resettling an additional 400 refugees from Indonesia<sup>158</sup> as well as 1,350 Burmese, Afghans, Iranians and other refugees from Malaysia as part of its targeted intake from priority regions.<sup>159</sup> In September 2012, the Government implemented the recommended changes to family sponsorship, removing family reunion concessions for boat arrivals “to further discourage people from risking their lives at sea”.<sup>160</sup> IMAs were still able, however, to sponsor family through the regular family stream of the Migration Program, which was

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<sup>155</sup> Houston, Aristotle and L’Estrange, *Report of the Expert Panel on Asylum Seekers*, p. 11.

<sup>156</sup> See, for example, Julia Gillard, press conference, Kuala Lumpur, 1 November 2010, <http://pmtranscripts.pmc.gov.au/release/transcript-17419>; accessed 14 February 2017.

<sup>157</sup> Julia Gillard, doorstep interview from Rarotonga, Cook Islands, 28 August 2012, <http://pmtranscripts.pmc.gov.au/release/transcript-18766>; accessed 14 February 2017; Julia Gillard, ‘Australia Signs Memorandum of Understanding with Nauru’, 29 August 2012, <http://pmtranscripts.pmc.gov.au/release/transcript-18767>; accessed 14 February 2017; Julia Gillard, doorstep interview, Vladivostok, 8 September 2012, <http://pmtranscripts.pmc.gov.au/release/transcript-18791>; accessed 14 February 2017.

<sup>158</sup> Julia Gillard and Chris Bowen, ‘Refugee Program Increased to 20,000 Places’, joint media release, 23 August 2012, <http://www.minister.immi.gov.au/media/cb/2012/cb189459.htm>; accessed 26 March 2013.

<sup>159</sup> Chris Bowen, ‘Priority Regions Announced for Refugee Intake Boost’, media release, 26 October 2012, <http://www.minister.immi.gov.au/media/cb/2012/cb191007.htm>; accessed 26 March 2013.

<sup>160</sup> Chris Bowen, ‘Government Implements Expert Panel’s Family Reunion Recommendation’, media release, 22 September 2012, <http://www.minister.immi.gov.au/media/cb/2012/cb190059.htm>; accessed 26 March 2013.

increased by 4,000 places per year to accommodate the extra demand. This meant that the relatives of refugees who arrived by boat would now be subject to stricter immigration criteria and liable for the visa fees, though as Menadue and Keski-Nummi pointed out, these were insubstantial compared to the costs – and risks – of paying a people smuggler for passage.<sup>161</sup>

### **A new Pacific Solution**

The Government also immediately pursued the necessary legislative amendments for the resumption of offshore processing in Nauru and on Manus Island. The Migration Legislation Amendment (Regional Processing and Other Measures) Bill 2012 specified that the Minister's designation of a regional processing country had to be by an individual legislative instrument, which meant that each designation was subject to parliamentary scrutiny and possible disallowance. It was passed in the Lower House on 15 August 2012, with the support of all but two MPs, Greens member Adam Bandt and independent Andrew Wilkie. The latter's amendment to limit detention offshore to 12 months failed; the Government and Opposition argued that it might be used by people smugglers to cultivate "an expectation that a designation will be coming to an end".<sup>162</sup> This meant that transferred asylum seekers were potentially subject to indefinite offshore detention. Gillard proudly declared that the House had "risen above the politics of the issue and taken clear action to save lives".<sup>163</sup> But the sight of the Immigration Minister, Chris Bowen, and his Opposition counterpart, Scott Morrison, shaking hands after the passage of the bill was also symbolic of a new bipartisanship on tough measures against asylum seeking. Gone was the idealism of Rudd in 2007, the determination of the ALP to chart a better course as it dismantled the Pacific Solution in 2008, and the optimism of Gillard's search for a regional cooperative approach to the issue. The Senate passed the legislation the following day, formalizing the bipartisan consensus on offshore processing. After a Memorandum of Understanding between

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<sup>161</sup> John Menadue and Arja Keski-Nummi, 'Seismic Shift Exposes Ghosts of Intolerance', *ABC The Drum Opinion*, 29 August 2012, <http://www.abc.net.au/unleashed/4230566.html>; accessed 29 August 2012.

<sup>162</sup> Chris Bowen, *CPD*, HoR, 14 August 2012, p. 8511.

<sup>163</sup> Gillard quoted in Ben Packham and Lania Vasek, 'Asylum-Seeker Bill Passes House of Representatives', *The Australian*, 15 August 2012, <http://www.theaustralian.com.au/national-affairs/immigration/asylum-seeker-bill-passes-house-of-representatives/story-fn9hm1gu-1226450947357>; accessed 15 August 2012.

Australia and Nauru was signed on 29 August, the Minister declared it in the national interest to begin transferring people to Nauru and designated it a regional processing country under the Migration Act.<sup>164</sup> According to Bowen, it was in the national interest to “discourage irregular and dangerous maritime voyages and thereby reduce the risk of the loss of life at sea” and to “promote the maintenance of a fair and orderly Refugee and Humanitarian Program that retains the confidence of the Australian people”.<sup>165</sup> And thus, the refugee processing facility on Nauru was quietly reopened on 14 September 2012 almost exactly 11 years after it was first established by the Howard Government and just four years after Labor closed it down while proudly declaring “a shameful and wasteful chapter in Australia’s immigration history” finished.<sup>166</sup> Gillard conceded that it was a compromise (“dead right – in order to start saving lives”<sup>167</sup>) while the Coalition claimed it as a victory.<sup>168</sup> Transfers to Manus Island subsequently began in November.

Gillard’s compromise may have taken the heat out of the issue, but it did not stop boats nor save lives as promised. Between 13 August 2012 (when the Houston report was released and the date from which the new policies applied) and the end of June 2013, a further 357 boats carrying 22,526 people arrived and there were at least 353 deaths at sea.<sup>169</sup> Asylum seeker

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<sup>164</sup> Chris Bowen, ‘Nauru Designated for Regional Processing’, media release, 10 September 2012, <http://pandora.nla.gov.au/pan/67564/20120920-0001/www.minister.immi.gov.au/media/cb/2012/cb189739.htm>; accessed 15 February 2017;

<sup>165</sup> Chris Bowen, ‘Instrument of Designation of the Republic of Nauru as a Regional Processing Country Under Subsection 198AB(1) of the Migration Act 1958’, 10 September 2012, [http://pandora.nla.gov.au/pan/67564/20120920-0001/www.minister.immi.gov.au/media/media-releases/\\_pdf/designation-statement-reasons.pdf](http://pandora.nla.gov.au/pan/67564/20120920-0001/www.minister.immi.gov.au/media/media-releases/_pdf/designation-statement-reasons.pdf); accessed 15 February 2017.

<sup>166</sup> Immigration Minister Chris Evans, address to the 2008 National Members’ Conference of the Migration Review Tribunal and Refugee Review Tribunal, 29 February 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>; accessed 4 September 2008.

<sup>167</sup> Gillard quoted in Jessica Wright, ‘Gillard Calls for Nauru’s Help’, *The Age*, 14 August 2014, <http://www.theage.com.au/opinion/political-news/gillard-calls-for-naurus-help-20120814-245h3.html>; accessed 14 August 2012.

<sup>168</sup> See, for example, Tony Abbott, *CPD*, HoR, 14 August 2012, pp. 8511-3.

<sup>169</sup> Calculated from DIAC data compiled by supplied by Elizabeth Hill, Freedom of Information Case Officer, Department of Immigration and Citizenship, ‘List of IMA Boats that have Arrived in Australia since 2011 until July 2013’, response to freedom of information request by Marg Hutton, 8 August 2013, <http://sievx.com/articles/FOI/DIAC/20130806-FA1305IMABoatsSince2011.pdf>; accessed 28 January 2015; and Border Crossing Observatory, Australian Border Deaths Database, last updated 9 January 2017, <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>; accessed 1 February 2017.



arrivals quickly exceeded the capacity of the offshore processing facilities, which meant that most of the asylum seekers continued to be processed onshore.<sup>170</sup> All IMAs arriving after 13 August 2012 were subject to the “no advantage” policy regardless of whether they were transferred to Nauru or Manus Island or allowed to remain on the mainland; that is to say, if found to be a refugee, they would nevertheless be required to wait for a permanent protection visa for an indeterminate period equivalent to the amount of time they might otherwise have waited in a UNHCR camp or transit country for a resettlement opportunity. Those processed in Australia were released into the community on bridging visas that excluded family reunion and work rights and provided only minimal accommodation and financial assistance (equal to 89 per cent of the nation’s lowest welfare payment).<sup>171</sup> An immigration spokesperson explained, “We do not want the provision of support to be an incentive”.<sup>172</sup> In this respect, the bridging visas were harsher than Howard’s TPV had been since they left vulnerable asylum seekers and refugees deliberately destitute and dependent on already stretched NGOs and charities for support whereas TPV holders had been able to work and received more generous support. While those on bridging visas who were found to be refugees were promised a permanent protection visa at the end of the “no advantage” period, they remained subject to offshore transfer in the meantime so, like the TPV holders had, they existed in a state of permanent uncertainty and anxiety.<sup>173</sup> Paris Aristotle, one of the experts on the Houston panel, argued these conditions were punitive and thus at odds with the ‘no advantage’ test, the purpose of which, he declared “must never be to crush people”, and in breach of Australia’s international commitments.<sup>174</sup> But as journalist Lenore Taylor pointed out, “Their state of sanity-sapping limbo... is the whole point. Removing work

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<sup>170</sup> By the end of August 2013, there were 8,732 people in onshore immigration detention facilities and ‘alternative places of detention’, 2,739 people living in the community after being approved for a residence determination, and 21,364 asylum seekers living in the community on bridging visas (Bridging Visa E). See DIAC, ‘Immigration Detention and Community Statistics Summary’, 31 August 2013, <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-aug2013.pdf>; accessed 20 February 2016.

<sup>171</sup> Andrea Petrie, ‘Seven Months Pregnant, a Floor for a Bed and \$6 a Day for Meals. Welcome to Australia’, *The Age*, 28 April 2013.

<sup>172</sup> Andrea Petrie, ‘Libs Urge Help for “Dumped” Boat People’, *The Age*, 5 May 2013, <http://www.theage.com.au/opinion/political-news/lib-urge-help-for-dumped-boat-people-20130504-2j06r.html>; accessed 5 May 2013.

<sup>173</sup> Chris Bowen, ‘No Advantage Onshore for Boat Arrivals’, media release, 21 November 2012, <http://www.minister.immi.gov.au/media/cb/2012/cb191883.htm>; accessed 1 December 2012.

<sup>174</sup> Paris Aristotle, ‘Unity for Human Rights’, *The Age*, 27 November 2012, p. 13.

rights and delaying the processing of claims for many years was supposed to remove hope and stop the boats.”<sup>175</sup>

Likewise, the offshore camps were deliberately designed to create despair and desperation among detainees. Like the last asylum seekers who had been “left rotting on Nauru”<sup>176</sup> until they were resettled by the Rudd Government in 2008, those now incarcerated in the Pacific by the Gillard Government were being used as to send a warning to others who might follow, sacrificing human lives in the name of deterrence. According to one employee of the detention centre service provider, Serco, “They know they’re the examples. They were pulled out of a hat to go to Nauru or Manus and they’ve been made examples.”<sup>177</sup> Within the first few months of operation there were numerous suicide attempts, hunger strikes, and other acts of self-harm.<sup>178</sup> It was as if the lessons of the Howard experiment with offshore processing – of which the Government had been reminded<sup>179</sup> – had been all but forgotten. But as leading refugee advocate and head of the Asylum Seeker Resources Centre Kon Karapanagiotidis pointed out, this despair was “no accident - this is a case of these centres working exactly how they’re meant to”.<sup>180</sup>

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<sup>175</sup> Lenore Taylor, ‘No Advantage, No Work, Dwindling Hope: The Asylum Seeker’s Lot’, *The Guardian*, 28 May 2013, <http://www.guardian.co.uk/world/2013/may/27/no-advantage-asylum-seekers-limbo>; accessed 28 May 2013.

<sup>176</sup> Chris Evans, ‘Refugee Policy Under the Rudd Government – The First Year’, address to the Refugee Council of Australia, Parramatta Town Hall, 17 November 2008, <http://www.minister.immi.gov.au/media/speeches/2008/ce081117.htm>; accessed 6 January 2012.

<sup>177</sup> Employee of Serco, the operator of detention centres, quoted in Eden Parris, ‘PM’s Tough Rhetoric on Self-Harming Reveals Darker Forces at Work’, *The Age*, 1 March 2013, <http://www.theage.com.au/opinion/politics/asylum-seekers-on-nauru-forced-to-play-scapegoat-20130228-2f8y5.html>; accessed 1 March 2013.

<sup>178</sup> See, for example, Tom Nightingale, ‘Asylum Detainees Self-Harm at Nauru’, *ABC AM*, 29 November 2012, <http://www.abc.net.au/am/content/2012/s3643346.htm>; accessed 28 April 2017.

<sup>179</sup> See, for example, Caroline Fleay, ‘Repeating Despair on Nauru: The Impacts of Offshore Processing on Asylum Seekers’, Centre for Human Rights Education, Curtin University, 12 September 2012, <http://humanrights.curtin.edu.au/wp-content/uploads/sites/27/2017/04/Nauru-report-12-Sept-2012.pdf>; accessed 29 April 2013.

<sup>180</sup> Asylum Seeker Resource Centre chief Kon Karapanagiotidis quoted in Bianca Hall, ‘Hell on Nauru Revealed’, *The Age*, 25 February 2013, <http://www.theage.com.au/opinion/political-news/hell-on-nauru-revealed-20130224-2ezox.html>; accessed 25 February 2013.

## Shrinking continent, shirking obligations

When in January 2013, Gillard made a surprisingly early election announcement, declaring the next federal election would be held on 14 September 2013, she made no mention of boats, asylum seekers, refugees, insecurity or borders. Instead, she spoke of security, certainty, prosperity and opportunities.<sup>181</sup> But the issue refused to go away. A new crisis ensued after an asylum seeker boat carrying approximately 66 men, women and children sailed undetected into the harbour at Geraldton in Western Australia in April. As the first mainland arrival since 2008, ‘the rickety old looking wooden boat’ was met with a mixture of astonishment and apprehension when it sailed into the harbour in front of surprised café patrons and dropped anchor.<sup>182</sup> The State Premier, Colin Barnett called it “a serious, unprecedented and unacceptable breach of Australia’s border security ... that a boat, laden with people, can sail into a busy regional port in broad daylight is shocking”.<sup>183</sup> Asylum seekers reaching the mainland could be detained but not transferred to one of the regional processing centres and could thus apply for a protection visa in Australia without relying on the discretion of the Immigration Minister. Although this boat was reportedly headed for New Zealand, its arrival on the West Australian coast suggested that people smugglers were now looking for new routes to bypass the excised territories for the mainland.<sup>184</sup> It was, as reporter Leigh Sales suggested, “the last thing the embattled Gillard Government need[ed], five months out from an election in which asylum seeker policy [was] shaping up as a bitter issue”.<sup>185</sup> It was, in fact, the last asylum seeker policy issue to which the Gillard Government

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<sup>181</sup> See Julia Gillard, address to the National Press Club, Canberra, 30 January 2013, <http://pmtranscripts.pmc.gov.au/release/transcript-19023>; accessed 14 February 2017.

<sup>182</sup> Café manager Steve Branch quoted in ‘Boat Carrying Asylum Seekers Pulls into Geraldton’, *ABC News*, 10 April 2013, <http://www.abc.net.au/news/2013-04-09/boat-carrying-asylum-seekers-pulls-into-geraldton/4618844>; accessed 10 April 2013.

<sup>183</sup> Barnett quoted in Aleisha Orr, ‘Asylum Seeker Boat in Geraldton’, *WA Today*, 9 April 2013, <http://www.watoday.com.au/wa-news/asylum-seeker-boat-in-geraldton-20130409-2hj0s.html>; accessed 9 April 2013.

<sup>184</sup> Indeed, a second boat reached the Northern Territory in May just prior to the passage of the Government’s legislation to excise the mainland. See Bianca Hall, ‘Asylum Boat Reaches NT Mainland’, *The Age*, 15 May 2013, <http://www.theage.com.au/national/asylum-boat-reaches-nt-mainland-20130515-2jmxo.html>; accessed 15 May 2013.

<sup>185</sup> Leigh Sales, ‘Asylum Seeker Boat Lands in Geraldton’, *7:30*, ABC TV, 9 April 2013, <http://www.abc.net.au/7.30/content/2013/s3733408.htm>; accessed 9 April 2013.

would attend. The following month Gillard succeeded where Howard had failed in 2006,<sup>186</sup> excising the mainland from the migration zone for all “unauthorised maritime arrivals” (previously “offshore entry persons”).<sup>187</sup> In line with the recommendation of the Houston panel to remove any advantage gained by arriving to Australia by boat,<sup>188</sup> the effect of this was to distinguish between *modes* of arrival (by air or sea) rather than *places* of arrival. This meant that anyone arriving by boat anywhere in Australia was now prohibited from applying for a visa (unless the Minister deemed it in the public interest) and could be transferred to one of the regional processing centres in the Pacific.<sup>189</sup> In Opposition in 2006 Bowen had argued that this would amount to a violation of the Convention, the provisions of which were to be applied “without discrimination as to race, religion or country of origin”, because “it treats people differently in Australia depending on what part of the world they have come from and how they arrive”.<sup>190</sup> At that time he suggested that the day the Bill were to pass the Parliament would “be the day that Australia turned its back on the Refugee Convention and on refugees escaping circumstances that most of us can only imagine” and would be “a stain on our national character”.<sup>191</sup> In Government he now argued it was necessary to save lives.<sup>192</sup>

The deaths at sea argument – that tough policies were required to save vulnerable asylum seekers from themselves – was the defining justification of the Gillard Government with respects to the development of its asylum seeker policies. It fitted with Labor’s “tough but

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<sup>186</sup> The Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 was prompted by the arrival of 43 West Papuan asylum seekers who were granted TPV thus causing a rift with the Indonesian Government who recalled its Ambassador from Canberra. The immediate purpose of the legislation was, as Neumann points out, “to prevent West Papuan refugees from using Australia as a safe base from which to criticise the government of Indonesia and, more generally, it is to discourage West Papuans from seeking asylum in Australia”. See Klaus Neumann, submission to the Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006, 22 May 2006, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2004-07/migration\\_unauthorised\\_arrivals/submissions/sublist](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/migration_unauthorised_arrivals/submissions/sublist); accessed 23 February 2017.

<sup>187</sup> *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, no. 35, 2013, assented to 20 May 2013, <https://www.legislation.gov.au/Details/C2013A00035>; accessed 20 June 2014.

<sup>188</sup> Recommendation 14, Houston, Aristotle and L’Estrange, *Report of the Expert Panel on Asylum Seekers*.

<sup>189</sup> Michael Jones, ‘So Where the Bloody Hell Aren’t You?’, *New Matilda*, 17 May 2013, <https://newmatilda.com/2013/05/17/so-where-bloody-hell-arent-you/>; accessed 17 May 2013.

<sup>190</sup> Convention quoted by Chris Bowen, *CPD*, HoR, 10 August 2006, p. 15.

<sup>191</sup> Chris Bowen, *CPD*, HoR, 10 August 2006, p. 15.

<sup>192</sup> See Chris Bowen interviewed by Tony Jones, *Lateline*, 31 October 2012, <http://www.abc.net.au/lateline/content/2012/s3623063.htm>; accessed 21 June 2013.

compassionate” theme; however, it was a high stakes gamble. Arguing that lives depended on the Government’s ability to stop the boats meant that so long as people continued to drown at sea while attempting to come to Australia, Gillard could not do nothing when her Government’s policies were blocked by the Opposition or judiciary, even if that meant ultimately implementing the Opposition’s policies. Though the motivation ostensibly differed from that of Howard’s Coalition Government, which sought to protect Australia’s borders, the effects were the same. In passing the excision legislation, the Gillard Government realised the ambitions of the Howard Government to fortify Australia against all sea-borne asylum seekers.

### **Losing the battle *and* losing the war**

When Gillard first took over from Rudd in 2010, asylum seeker policy was one of the key issues on which she staked her leadership. It would also be one of the key issues leading to her downfall. By June 2013, Gillard found herself in the same position Rudd had been three years earlier. It was also the same position Howard had found himself in 2001 prior to the arrival of the *Tampa*, with boat arrivals at an all time high, a federal election looming and pressure coming from concerned MPs in Western Sydney urging action on the asylum issue.<sup>193</sup> However, it was not Gillard but Rudd who would do this, after reclaiming the leadership almost exactly three years to the day that he was ousted by Gillard. The man who led the party to the 2013 federal election was not the same man who had rescued Labor from the “electoral wilderness”<sup>194</sup> in 2007. If Rudd was to have any chance at winning the September election, he could neither afford to ignore or go lightly on this contentious issue. After the death of four more asylum seekers whose boat (the *Oneonta* – SIEV 794) capsized off Christmas Island, Opposition leader Tony Abbott declared the issue “a national emergency”.<sup>195</sup> Two days later, Rudd announced that “[t]he rules [had] changed”. From that

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<sup>193</sup> Emma Griffiths, ‘Laurie Ferguson Tells Julia Gillard that Labor is “Dead” Without Voter Support on Asylum Seekers’, *ABC News*, 5 June 2013, <http://www.abc.net.au/news/2013-06-04/ferguson-says-labor-dead-without-voter-support-on-asylum-seekers/4731694>; accessed 5 June 2013.

<sup>194</sup> Paul Williams, ‘The 2007 Australian Federal Election: The Story of Labor’s Return from the Electoral Wilderness’, *Australian Journal of Politics and History*, vol. 54, no. 1, 2008, pp. 104-25.

<sup>195</sup> Melanie Christiansen and Claudette Werden, ‘Abbott: Asylum Seekers Issue is a “National Emergency”’, *Radio National Drive*, ABC Radio, 17 July 2013, <http://www.abc.net.au/radionational/programs/drive/abbott-declares-asylum-seeker-issue-a-national-emergency/4826582>; accessed 16 April 2015.

day forward, asylum seekers arriving to Australia by boat would “have no prospect of being resettled in Australia”.<sup>196</sup> According to the Prime Minister, Australians had “had enough”: “of seeing people drown”; “of people smugglers exploiting asylum seekers”; and “of watching our servicemen and women risking their lives in rescues”.<sup>197</sup> Under the Australia and Papua New Guinea Regional Settlement Arrangement announced by Rudd on 19 July 2013, all asylum seekers arriving by boat would henceforth be transferred to PNG for processing and resettlement there. Unlike Gillard’s proposed Malaysian Arrangement, there was no cap on the number of people who could be transferred to PNG under this Arrangement.

Kevin ‘07 had expressed his determination to “make sure this country maintains an open heart”, arguing that “if we, as one of the initiators of the post-war Refugee Convention consensus, are seen to be fragmenting it at the edges, we are also part and parcel of fragmenting the global consensus and machinery for dealing with refugee challenges into the future. I never”, he declared fervently in 2007, “want to be part of a government that does that”.<sup>198</sup> Five years later, Rudd was not just part of, but leading (albeit, briefly), a government that had done just that. Australia was now completely inoculated against the provision of protection to anyone arriving uninvited by boat and claiming asylum under the terms of the Refugee Convention. In contrast to the principled position he had claimed back in and before his first term, Rudd now argued that “Australian Governments have never had a policy on asylum seekers that is set in stone” and, marrying the rhetoric and justifications of both Howard and Gillard as well as his first term self, insisted that he had

to do everything possible to protect our orderly migration system and the integrity of our borders. The bottom line is that we have to protect lives by

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<sup>196</sup> Kevin Rudd, transcript of broadcast on the Regional Resettlement Arrangement between Australia and PNG, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/transcript-broadcast-regional-resettlement-arrangement-between-australia-and-png.html>; accessed 28 March 2017.

<sup>197</sup> Kevin Rudd, ‘Australia and Papua New Guinea Regional Settlement Arrangement’, media release, 19 July 2013, <http://pandora.nla.gov.au/pan/79983/20130830-1433/www.pm.gov.au/press-office/australia-and-papua-new-guinea-regional-settlement-arrangement.html>; 28 March 2017.

<sup>198</sup> Kevin Rudd, speech to the Australia Christian Lobby, August 2007, cited in David Marr, ‘Power Trip: The Political Journey of Kevin Rudd’, *Quarterly Essay*, vol. 38, 2010, pp. 66-7.

dealing robustly with people smugglers. Australians have had enough of seeing asylum seekers dying in the waters to our north and our northwest.<sup>199</sup>

In contrast to Rudd, Gillard maintained a consistent position. As Shadow Minister for Immigration in 2003, she had identified the refugee issue as one of the “three Rs” (together with reconciliation and the republic) with which the Coalition had wedged Labor between its tertiary educated and traditional blue-collar constituencies and, as a result, won the culture war.<sup>200</sup> “Australia [had] been changed for the worse by John Howard”, Gillard argued, but Labor could “make it better again”.<sup>201</sup> The challenge for progressives, however, was “to understand that the agenda of the three Rs needs to be sited within a broader vision of Australia, which is inclusive of those who rightly worry about jobs, health, education, roads, border security and the like”.<sup>202</sup> Gillard knew that the party needed to construct policies that would win votes. Howard had demonstrated that the best way to win votes was to show that the Government was in control of the fate and future of the nation, that it alone would decide when, to whom, and how widely it would open the gates of the Australian sanctuary. As her first major policy address at the Lowy Institute made clear, this was the approach that Gillard brought with her to the top office in 2010, replacing Rudd’s failed idealism with a political pragmatism. Gillard was willing to empathise and engage with those people, like Penrith service station manager, Michelle Beale, who claimed her suspicion of asylum seekers had “nothing to do with race; it’s to do with safety. ... We don’t know who they are, where they come from. You’ve got your daughters and grandsons in the community”.<sup>203</sup> These were the voters who had been attracted to Pauline Hanson’s simple solutions. They were the voters that Howard won back when he adopted some of Hanson’s policies. And it was for these voters that Gillard had promised to build a sanctuary.

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<sup>199</sup> Rudd, transcript of broadcast on the Regional Resettlement Arrangement.

<sup>200</sup> Julia Gillard, ‘Winning the Culture War’, *The Sydney Papers*, vol. 15, no. 1, 2003, p. 99.

<sup>201</sup> *Ibid.*, p. 103.

<sup>202</sup> *Ibid.*, p. 107.

<sup>203</sup> Erik Jensen, ‘If You Look in the Mirror, You See Fear and Distrust Coming Ashore’, *Sydney Morning Herald*, 15 October 2011, <http://www.smh.com.au/national/if-you-look-in-the-mirror-you-see-fear-and-distrust-coming-ashore-20111014-1lp9p.html>; accessed 15 October 2011.

However, in a series of policy failures, the Gillard Government failed to construct either a secure sanctuary for anxious Australians or a regional cooperative solution to stop the boats and prevent deaths at sea. Between June 2010 and June 2013, more than 40,000 unauthorised asylum seekers arrived to Australia by boat and more than 1,000 people were known to have drowned at sea.<sup>204</sup> Instead, under Gillard, the ALP conceded what little high ground it had once occupied. With her failed East Timor solution, Gillard re-established the bipartisan consensus on offshore processing. With her thwarted Malaysian solution, her Government abandoned Labor's opposition to the outsourcing of its international duties to countries that were either not, or only cursorily, subscribed to the Refugee Convention. And with the excision of the mainland Australia under Gillard's leadership, Australia turned its back on the Convention that it had helped draft and to which the ALP had once been so committed. In her desperation to stop the boats and the drownings, Gillard ultimately re-implemented – and extended – the policies of the Howard era.

Gillard's Pacific Solution was, like the original, extraordinarily expensive, forecast to cost an estimated \$2.3 billion over four years (a figure that is put into perspective by comparing it to the UNHCR annual budget of \$3.7 billion to assist some 25 million refugees worldwide).<sup>205</sup> It involved – or rather necessitated – the indefinite offshore detention of a vulnerable population, including children. It left thousands of people in a constant state of limbo and anxiety in the community. The effects of these policies were as damaging as those of the Howard Government.<sup>206</sup> Moreover, they were ineffectual, just as Gillard had once insisted they would be. The threat of offshore processing proved to be an ineffective deterrent to asylum seekers, who continued to arrive in greater numbers than ever before after its reimplementation (an average of more than 2,000 IMAs per month following the re-opening

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<sup>204</sup> Calculated from the Border Crossing Observatory, Australian Border Deaths Database, last updated 19 October 2016, <http://artsonline.monash.edu.au/thebordercrossingobservatory/publications/australian-border-deaths-database/>; accessed 1 February 2017.

<sup>205</sup> Bianca Hall, “‘Ashamed to be Australian’: Doctor Slams Manus Island Centre”, *The Age*, 30 April 2013, <http://www.theage.com.au/opinion/political-news/ashamed-to-be-australian-doctor-slams-manus-island-centre-20130429-2iov1.html>; accessed 30 April 2013.

<sup>206</sup> See, for example, *ibid.*; Australian Human Rights Commission (AHRC), “The Forgotten Children: National Inquiry into Children in Detention”, November 2014, [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf); accessed 21 February 2017; AHRC, ‘2011 Immigration Detention at Villawood’.



of Nauru and almost 2,700 IMAs in June 2013 alone after the passage of the excision legislation).<sup>207</sup> As a result, they failed to turn her Government's fortunes around as they had done for Howard. Gillard lost the leadership and, in September 2013, the ALP lost the federal election. Furthermore, in losing the battle against the boats, the Gillard Government also lost a key aspect of the culture war that Howard had instigated.

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<sup>207</sup> Calculated from DIAC data supplied to Marg Hutton by Don Smith.

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**PART V**  
**CONCLUSION**

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*If people don't understand the history, then they will make the same mistakes into the future.*

Immigration Minister Peter Dutton, November 2016

## 5.0 Enough is Enough: Correcting the Record and Course of Australia's Refugee History

Make no mistake about people who leap from burning windows. Their terror of falling from a great height is still just as great as it would be for you or me standing speculatively at the same window just checking out the view; i.e. the fear of falling remains a constant. The variable here is the other terror, the fire's flames: when the flames get close enough, falling to death becomes the slightly less terrible of two terrors. It's not desiring the fall; it's terror of the flames. And yet nobody down on the sidewalk, looking up and yelling 'Don't!' and 'Hang on!', can understand the jump. Not really. You'd have to have personally been trapped and felt flames to really understand a terror way beyond falling.<sup>1</sup>

### Sovereign borders

In one of the first acts of Tony Abbott's Coalition Government after it came to power in September 2013, the Department of Immigration and Citizenship (DIAC) was renamed the Department of Immigration and Border Protection (DIBP). It was a telling transition. The new Government moved quickly on its promise to "stop the boats" via a combination of denial and deterrence strategies. Under the military-led Operation Sovereign Borders, boats were intercepted at sea and turned back to their point of departure, regardless of the refugee claims of their occupants. Asylum seekers already in Australia with pending claims that were subsequently found to be valid were provided temporary protection visas only (a revival of the Howard Government initiative) and all subsequent arrivals were transferred to Manus Island or Nauru for processing. None would ever be resettled permanently in Australia. Citizenship was no longer a possibility for refugees arriving to Australia by boat.

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<sup>1</sup> David Foster Wallace, *Infinite Jest*, Little, Boston, 1996, pp. 696-7.

With just one boat arrival in 2014 and none since, the Coalition has claimed success in securing Australia's borders. But this success has come at a great human cost. This was dramatically illustrated in July 2014, when, over the course of two days, at least ten women in immigration detention on Christmas Island tried to kill themselves. One of the women tried to suffocate herself with a plastic bag. One tried to hang herself. Another threw herself from the roof of a building. Some reportedly drank poisonous substances, others smashed their heads against walls or windows, one managing to gouge her arms on the broken glass as guards pulled her away. When one woman's husband stopped her from cutting her wrists with a razor, she broke a cup and tried to use the broken shards instead.<sup>2</sup> All were mothers of young babies born in Australia after they had sought asylum there. All had arrived after 19 July 2013 when then-Prime Minister Kevin Rudd had announced that asylum seekers arriving by boat henceforth would not be processed or resettled in Australia even if they were found to be refugees.

The women had asked to be moved to the mainland pending the outcome of a court case determining the rights of children born in Australia to mothers in immigration detention. Their babies were suffering from chronic gut and chest infections and exhibiting developmental delays, the result, according to Professor Elizabeth Elliott, a paediatrician who visited the camp that month, of living in unhygienic and cramped conditions.<sup>3</sup> Other experts testified to the unsuitability of the environment for young children.<sup>4</sup> The mothers' requests were pitifully small: they wanted room for their babies to be able to learn to crawl and walk; safe, clean places to be able to set them down; and cots for them to sleep in. They

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<sup>2</sup> Australian Human Rights Commission (henceforth AHRC), 'The Forgotten Children: National Inquiry into Children in Detention', November 2014, p. 100, [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf); accessed 21 February 2017; Aleisha Orr, 'Asylum Seekers Attempt Suicide on Christmas Island', *WA Today*, 8 July 2014, <http://www.watoday.com.au/wa-news/asylum-seekers-attempt-suicide-on-christmas-island-20140708-zt0ho.html>; accessed 3 April 2017; Refugee Action Coalition, 'Mothers Attempt Suicide as Conditions Deteriorate on Christmas Island', media release, 8 July 2014, <http://www.refugeeaction.org.au/?p=3362>; accessed 4 April 2017.

<sup>3</sup> Professor of Paediatrics and Child Health Elizabeth Elliott, Sydney Public Hearing, National Inquiry into Children in Immigration Detention 2014, 31 July 2014, <https://www.humanrights.gov.au/sites/default/files/Prof%20Elliott.pdf>; accessed 23 October 2014.

<sup>4</sup> See, for example, paediatrician Karen Zwi, child psychiatrist Sarah Mares, and Grant Ferguson, a doctor at the Christmas Island Medical Centre in 2013, whose expert testimonies are cited in AHRC, 'The Forgotten Children', pp. 94-103.

were worried about the giant centipedes, football-sized crabs, worms and rats with which they cohabited in the camp and complained that they were given out-of-date food and no eggs or fruit to feed their children.<sup>5</sup> But instead of being transferred to the mainland, they were told they were to be sent to Nauru or Manus Island and reminded that they would never be resettled in Australia. Concerned about the health and wellbeing of their children and despairing at the hopeless situation in which they found themselves – facing potentially endless incarceration on a remote island, resettlement not in Australia but one of its impoverished neighbours only, or repatriation back to the dangers they had fled – the mothers had decided that their babies stood a better chance at life if they were dead. “Enough is enough”, cried one of the women, a mother of three, “I have had enough torture in my life. I have escaped from my country. Now, I prefer to die, just so my children might have some relief.”<sup>6</sup> As Gordon Thompson, president of the Christmas Island Shire Council, explained, “[t]heir thinking is that if the babies have been born in Australia, they cannot be sent anywhere else.”<sup>7</sup>

Prime Minister Tony Abbott was unmoved by these exhibitions of “utter despair”<sup>8</sup> and resolute that the Government would not capitulate to “moral blackmail”. “No Australian government”, he indignantly proclaimed, “should be subjected to the spectacle of people saying ‘unless you accept us, I am going to commit self-harm’.”<sup>9</sup> Immigration Minister Scott Morrison expressed concern but insisted that the Government remained focused on “the results that those policy environments produce”, namely, that people were “not getting on

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<sup>5</sup> See AHRC, *The Forgotten Children*, pp. 98-101.

<sup>6</sup> Mother of three children, Construction Camp Detention Centre, Christmas Island, 17 July 2014, quoted in AHRC, “The Forgotten Children”, p. 65.

<sup>7</sup> Gordon Thompson, quoted in Sarah Whyte, ‘Asylum Seeker Mothers on Christmas Island Attempt Suicide in Bid to Help Children’, *Sydney Morning Herald*, 8 July 2014, <http://www.smh.com.au/federal-politics/political-news/asylum-seeker-mothers-on-christmas-island-attempt-suicide-in-bid-to-help-children-20140708-3bl0j.html>; accessed 26 October 2016.

<sup>8</sup> Jacob Varghese, lawyer from Maurice Blackburn representing 72 asylum seeker babies, quoted in *ibid.*

<sup>9</sup> Tony Abbott quoted in Matthew Knott, ‘Tony Abbott Says Government Will Not Give In to “Moral Blackmail” Over Asylum Seeker Suicide Attempts’, *Sydney Morning Herald*, 9 July 2014, <http://www.smh.com.au/federal-politics/political-news/tony-abbott-says-government-will-not-give-in-to-moral-blackmail-over-asylum-seeker-suicide-attempts-20140708-3blh3>; accessed 26 October 2016.

the boats anymore”.<sup>10</sup> When, in November 2014, the Australian Human Rights Commission released its report of the national inquiry into children in immigration detention, which chronicled these and other incidents of self-harm and revealed shocking levels of physical and sexual abuse throughout Australia’s detention regime,<sup>11</sup> the Prime Minister labelled the inquiry a “transparent stitch-up”.<sup>12</sup> He suggested that the Commission should instead “be writing congratulating letters to the former minister for Immigration and Border Protection [Morrison]” for stopping the boats and (hypothetically) saving lives.<sup>13</sup> When the allegations of sexual and physical abuse were corroborated by an independent review commissioned by the Government into the conditions at the Nauru processing centre,<sup>14</sup> Abbott defended the Government’s policies, arguing, “occasionally... things happen”.<sup>15</sup> Stopping the boats, he repeatedly argued, was “[t]he most humanitarian, the most decent, the most compassionate thing” the Government could do and the offshore camps were an important part of that.<sup>16</sup>

### **Not drowning**

The despair and desperation of those caught in interminable limbo by Australia’s policies was again highlighted in April 2016 when a 23-year-old Iranian refugee, Omid Masoumali, set himself alight during a visit to the Nauru regional processing centre by UNHCR representatives, screaming, “This is how tired we are. This action will prove how exhausted

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<sup>10</sup> Scott Morrison, Fourth Public Hearing of the National Inquiry into Children in Immigration Detention 2014, Canberra, 5 August 2014, p. 32, <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/nationalinquiry-children-immigration-detention-2014-1>; accessed 8 October 2014.

<sup>11</sup> AHRC, ‘The Forgotten Children’.

<sup>12</sup> Tony Abbott, *Commonwealth Parliamentary Debates*, House of Representatives, 12 February 2015, p. 714.

<sup>13</sup> *Ibid.*

<sup>14</sup> Philip Moss, ‘Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru: Final Report’, 20 March 2015, <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf>; accessed 25 March 2015.

<sup>15</sup> Tony Abbott interviewed on 2GB radio, 20 March 2015, quoted in Daniel Hurst, “‘Things Happen’: Tony Abbott on Sexual Assault Allegations in Offshore Detention”, *The Guardian*, 20 March 2015, <https://www.theguardian.com/australia-news/2015/mar/20/things-happen-tony-abbott-on-sexual-assault-allegations-in-offshore-detention>; accessed 20 March 2015.

<sup>16</sup> Tony Abbott, joint doorstep interview, Middle Swan, 9 March 2015, <http://pmtranscripts.pmc.gov.au/release/transcript-24267>; accessed 6 December 2016.

we are. I cannot take it anymore.”<sup>17</sup> He died two days later from his injuries. Just days later, Hodan Yasin, a 21-year-old Somali woman, set her self alight after being forcibly returned to Nauru from the mainland where she had been receiving medical care. She sustained burns to 70% of her body and lost several fingers as a result.<sup>18</sup> Later that month another woman in detention on Nauru, an Iranian refugee mother, locked herself inside her family’s unit and set it on fire in an attempt to incinerate herself.<sup>19</sup> In October and again in November 2016, Amin Afravi, an Iranian asylum seeker, and father of a five-year-old boy, who had been in detention on Manus Island for three years, tried to set himself on a fire, explaining, “I have nothing to lose. I have just my life and I don’t want it.”<sup>20</sup>

The new (and current) Minister for Immigration, Peter Dutton, refused to concede that these burning bodies were evidence of policy flaws, the consequence of a set of border protection policies that punished a group of vulnerable people as deterrence to others. He implied that they were futile and manipulative attempts to gain entry to Australia and blamed refugee advocates for providing “false hope to these people who are in a very desperate situation”.<sup>21</sup> He reiterated the Government’s unwavering position that no one arriving by boat would ever settle permanently in Australia and used the opportunity to attack the Opposition’s commitment to strong border protection.<sup>22</sup> The policies that kept people who had

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<sup>17</sup> Austin Ramzy, ‘Kept From Australia, Refugee from Nauru Center Sets Himself on Fire’, *New York Times*, 27 April 2016, [http://www.nytimes.com/2016/04/28/world/australia/nauru-iranian-refugee-self-immolation.html?smid=fb-nytimes&smtyp=cur&\\_r=0](http://www.nytimes.com/2016/04/28/world/australia/nauru-iranian-refugee-self-immolation.html?smid=fb-nytimes&smtyp=cur&_r=0); accessed 28 April 2016.

<sup>18</sup> Helen Davidson and Ben Doherty, ‘Second Refugee Sets Themselves Alight on Nauru’, *The Guardian*, 2 May 2016, <http://www.theguardian.com/world/2016/may/02/second-refugee-sets-themselves-alight-on-nauru>; accessed 2 May 2016.

<sup>19</sup> Nicole Hasham, ‘Mentally Ill Refugee Tied to Incinerate Herself at Nauru, Husband Says’, *Sydney Morning Herald*, 25 May 2016, <http://www.smh.com.au/federal-politics/political-news/mentally-ill-refugee-tried-to-incinerate-herself-at-nauru-husband-says-20160525-gp3d6m>; accessed 25 May 2016.

<sup>20</sup> Timna Jacks, ‘Manus Island Detainee Tries to Exit “Hell” – By Attempting to Set Himself Alight’, *The Age*, 5 November 2016, <http://www.theage.com.au/national/manus-island-detainee-tries-to-set-himself-alight-to-exit-hell-20161104-gsimw5.html>; 24 November 2016.

<sup>21</sup> Peter Dutton, press conference, 27 April 2016, <http://pandora.nla.gov.au/pan/143035/20170323-0121/www.minister.border.gov.au/peterdutton/2016/Pages/press-conf-27042016.html>; accessed 5 April 2017.

<sup>22</sup> Of eight press releases the Minister made on the day of Masoumali’s self-immolation and in the two days following the distressing incident, four were critical of the Opposition’s border protection policies and none made reference to the refugee’s self-immolation and subsequent death. See, for example, Peter Dutton, ‘Marles Weakens on Key Border Policy’, media release, 27 April 2016, <http://pandora.nla.gov.au/pan/143035/20170323-0121/www.minister.border.gov.au/peterdutton/2016/Pages/marles-weakens-on-key-border-policy.html>;



committed no crime incarcerated indefinitely on remote islands with no hope of resettlement in Australia were needed, he argued, to prevent other asylum seekers from dying at sea, but also to “make sure that our borders remain secure so that we can keep our community in Australia as safe as possible”.<sup>23</sup> Dutton pointed to Europe where “countries [had] lost control of their borders”, arguing that the “[terrorist] threats that we’re seeing across Europe, including in Brussels and manifesting in Paris and elsewhere... are the threats that we need to deal with border crossings every day”.<sup>24</sup> (His suggestion that terrorist organisations were using refugee pathways was unsubstantiated; almost all involved in the Paris and Brussels terror attacks had been born and raised in Europe and, as the head of the Australian Security Intelligence Organisation [ASIO], Duncan Lewis, recently confirmed during a Senate estimates committee, there was no evidence linking refugees to terrorism in Australia.<sup>25</sup>) During a September 2016 visit to New York for refugee summits convened by the United Nations General Assembly and then-US President Barack Obama, the new Prime Minister Malcolm Turnbull suggested that Australians had “every reason to be proud of [the way their nation received and treated refugees]”, arguing that the Government’s approach was right: “It is principled, it is pragmatic, it stops people smugglers, it stops people drowning at sea and it finds homes in Australia for thousands of refugees.”<sup>26</sup>

To be sure, people were no longer drowning in Australian waters. But while the Government vigilantly guarded its shores against smugglers and shipwrecks, they were combusting in the

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accessed 5 April 2017; Peter Dutton, ‘Labor Split on Boats – Again’, media release, <http://pandora.nla.gov.au/pan/143035/20170323-0121/www.minister.border.gov.au/peterdutton/2016/Pages/labor-split-on-boats-again.html>; 28 April 2016.

<sup>23</sup> Peter Dutton interviewed by Leigh Sales, 7:30, ABC TV, 28 April 2016, <http://pandora.nla.gov.au/pan/143035/20170323-0121/www.minister.border.gov.au/peterdutton/2016/Pages/interview-with-leigh-sales-28-04-2016.html>; accessed 5 April 2017.

<sup>24</sup> Peter Dutton, press conference, 27 April 2016, <http://pandora.nla.gov.au/pan/143035/20170323-0121/www.minister.border.gov.au/peterdutton/2016/Pages/press-conf-27042016.html>; accessed 5 April 2017.

<sup>25</sup> ‘Paris Attacks: Who Were the Attackers?’, *BBC News*, 27 April 2016, <http://www.bbc.com/news/world-europe-34832512>; accessed 11 April 2017; Duncan Lewis, Senate Legal and Constitutional Affairs Legislation Committee 2017-18 Budget Estimates, Canberra, 25 May 2017, p. 135, [http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/2bf64e84-7744-4cff-a503-a6b0ca159860/toc\\_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee\\_2017\\_05\\_25\\_5046.pdf](http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/2bf64e84-7744-4cff-a503-a6b0ca159860/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_05_25_5046.pdf); accessed 18 June 2017.

<sup>26</sup> Malcolm Turnbull, United Nations doorstep interview, New York, 21 September 2016, <https://www.pm.gov.au/media/2016-09-21/united-nations-doorstop>; accessed 30 September 2016.

camps. They were being brutalised and demoralised, their bodies broken and their minds too. International Health and Medical Services (IHMS), the company contracted by the Government to provide healthcare services to immigration detainees, reported that the level of serious mental distress amongst offshore detainees was at least twice that of the Australian community.<sup>27</sup> On the basis of frequent monitoring visits with medical experts, UNHCR found that the rates of depressive or anxiety disorders and/or post-traumatic stress disorder amongst the asylum seeker and refugee population on Manus Island were “amongst the highest recorded rates of any surveyed population” and that “the circumstances, conditions and duration of detention [had likely] contributed significantly to the development of these disorders”.<sup>28</sup> The conditions of the detainees’ incarceration, it was claimed, violated human rights,<sup>29</sup> constituted crimes against humanity<sup>30</sup> and amounted to torture.<sup>31</sup> Men, women and children who had fled persecution and come seeking asylum were being used as heads on stakes to ward off other unwanted arrivals and reassure an anxious domestic audience that the Government had the ‘threat’ under control. These policies were popular domestically. On the same day that the suicide attempts of the mothers on Christmas Island were

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<sup>27</sup> IHMS, ‘Offshore Processing Centres Quarterly Health Trend Report, Quarter 4, October – December 2014’, <https://www.border.gov.au/AccessandAccountability/Documents/02092015-fa-15040021.pdf>; accessed 11 April 2017.

<sup>28</sup> UNHCR, ‘Submission by the Office of the United Nations High Commissioner for Refugees on the Inquiry into the Serious Allegations Of Abuse, Self-Harm and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations in Relation to the Manus Regional Processing Centre Referred to the Senate Legal and Constitutional Affairs Committee’, submission 43, 15 November 2016, p. 32, <http://www.unhcr.org/58362da34.html>; accessed 6 April 2017.

<sup>29</sup> Amnesty International Australia, ‘This is Breaking People: Human Rights Violations at Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea’, Amnesty International, December 2013, p. 4, [http://www.amnesty.org.au/images/uploads/about/Amnesty\\_International\\_Manus\\_Island\\_report.pdf](http://www.amnesty.org.au/images/uploads/about/Amnesty_International_Manus_Island_report.pdf); accessed 26 February 2014.

<sup>30</sup> Global Legal Action Network and the Stanford International Human Rights Clinic, ‘The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity in the Detention of Refugees and Asylum Seekers’, Communiqué to the Office of the Prosecutor of the International Criminal Court under Article 15 of the Rome Statute, 14 February 2017, <https://stanford.app.box.com/s/zwgni2zvaj4l37f1tyjeg67k0eapw2s2>; accessed 11 April 2017.

<sup>31</sup> Juan E. Méndez, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment, Agenda item 3, 28<sup>th</sup> session of the United Nations Human Rights Council, Addendum, Observations on Communications Transmitted to Governments and Replies Received, A/HRC/28/68/Add.1 6 March 2015; Amnesty International, *Islands of Despair: Australia’s Processing Refugees on Nauru*, Amnesty International, 17 October 2016, pp. 7, 43, 48-9; Association for the Prevention of Torture, submission on Australia for the UN Committee Against Torture 53rd Session (3-28 November 2014), 17 October 2014, [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT\\_CAT\\_NGO\\_AUS\\_18683\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_NGO_AUS_18683_E.pdf); accessed 6 April 2017.

reported, a poll revealed that more than a third of Australians believed the Government was taking the right approach with respect to asylum seekers, while a further 18% believed it was still too soft.<sup>32</sup> These figures did not wane as the catalogue of abuse, self-harm and deaths in detention grew. By November 2016, an even greater proportion of the population believed the Government's approach was just right (37%) or too soft (24%).<sup>33</sup>

“How did we get here?” asks writer Joshua Mostafa, “where it is politically unthinkable to honour that most basic of human values: hospitality to those in desperate need?”<sup>34</sup> How, indeed, did Australia, a nation founded by boat people and built by immigrants, the land of the fair go, arrive at a place where its policies would lead mothers to abandon their infants and young people to set fire to their own bodies? Where people would choose to jump rather than face the flames? Where these desperate acts, the torturous conditions of the camps, and even abuses perpetrated within them could be considered an unavoidable means to a justifiable end? That is the very question I set out to answer in this thesis.

In order to explain the present it is necessary to understand the past. Policies, despite what their architects might claim, are not, by their very nature, principled. They are not solid, static objects carved anew by each government and then cast aside by the next. Rather, they are pragmatic, reactive, and cumulative. They might be conceived according to an objective set of political principles but they are never created in a political vacuum. They are responsive to situations as they arise, vulnerable to public and political whims, and necessarily alter or build upon what has come before. They thus have long genealogies, a fact often overlooked in both explanatory and normative accounts of Australia's current border protection and (anti-) asylum seeker policies as noted in Chapter 1.1. As well as constructing a detailed, critical account of the policies and practises of the post-millennial period, I therefore revisited and re-examined Australia's historical responses to refugees and asylum seekers.

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<sup>32</sup> Bernard Keane, ‘Essential: Approval Rises for Asylum Seeker Policy’, *Crikey*, 8 July 2014, <http://www.crikey.com.au/?p=446228>; accessed 13 May 2016.

<sup>33</sup> Essential Research, ‘Too Soft or Too Tough on Asylum Seekers’, *Essential Report*, 8 November 2016, <http://www.essentialvision.com.au/too-soft-or-too-tough-on-asylum-seekers-9>; accessed 8 April 2017.

<sup>34</sup> Joshua Mostafa, ‘Against Progress: Dreams, Nightmares, and the Meaning of Abbott’, *Southerly*, vol. 74, no. 2, 2014, p. 99.

Other accounts of Australia's refugee history tend to be either *episodic*, necessarily focusing on a limited period or particular population of refugees and asylum seekers in order to provide depth, or *impressionistic*, selectively skimming the historical record to paint a particular picture of Australia's contribution to refugee crises, a criticism that applies equally to official and advocate accounts of Australia's responses to refugees. Of the few more expansive works that take a longer and deeper view of Australia's humanitarian history, such as the works of Klaus Neumann, Frank Brennan and Don McMaster, none cover the controversial post-millennial period, which is examined in substantial detail in this thesis. The significance of this thesis therefore lies in its scope and level of detail. With its long historical lens, this thesis shows that Australia's present policies have deep roots and that current developments were foreshadowed by, and have built upon, the policies and practices of the past. It challenges those accounts that regard the present as a lamentable break with the past (as per advocate accounts) or the continuation of a proud history (as official accounts suggest). Exposing and correcting conventional (mis)understandings upon which policy is justified and advocacy is formulated is important because, as Australia's current Minister for Immigration Peter Dutton has suggested – with galling obliviousness to the blinkered perspective of his own Government – “[i]f people don't understand the history, then they will make the same mistakes into the future”.<sup>35</sup>

As noted in Part 1 of this thesis, the exclusionary policies of the post-millennial period in Australia are often characterised as exceptional, an unprecedented response to intensifying globalization, international terrorism, and the increasing mobilization of the global population. These factors collided in 2001, when the arrival of the *Tampa* was closely followed by the 9/11 terrorist attacks in the United States immediately prior to a federal election that took place in a political landscape marred by right-wing populism. The *Tampa* incident, as described in Chapter 1.2, is therefore often used to pinpoint the moment Australia first adopted a different – and much harsher – attitude towards asylum seekers, the ‘Australian way’, of which the current Coalition Government is so proud. Certainly, as I

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<sup>35</sup> Peter Dutton, interview with Ray Hadley, Radio 2GB-4BC, 24 November 2016, <http://www.minister.border.gov.au/peterdutton/Pages/Interview-with-Ray-Hadley,-Radio-2GB.aspx>; accessed 18 June 2017.

argued in Chapter 1.2 and Chapter 4.1, in which I scrutinised refugee and asylum policy under the Howard Government prior to the *Tampa* incident, these factors were not insignificant with respect to the development of the Howard Government's Pacific Solution policies. But, as Parts II and III of the thesis reveal, these policies did not represent a new direction for Australia.

Although Australia's approach to those seeking refuge within its borders was defined both domestically and internationally by its response to the *Tampa*, the Pacific Solution did not redefine Australian asylum policy as such. Howard's harsh solution to the problem of unwanted boat arrivals was not an aberration from an otherwise proud humanitarian record but rather the continuation and extension of the migration management approach that had characterised Australia's responses to refugees since Federation. The critical overview of the way that respective Australian governments dealt with refugees from Federation until the mid-1970s (that is, prior to the arrival of boat-borne asylum seekers) in Part II shows that those accounts suggesting Australia has a long, generous and compassionate history of altruistic refugee resettlement are based on an expedient reading of the facts that conflates outcomes with objectives and confuses pragmatism for humanitarianism. Australia's reputation as a generous and welcoming sanctuary derives from its acceptance of various refugee populations – amongst others, the Jews before the Second World War and the displaced of Europe in its aftermath, those fleeing Communism in Europe the 1950s and Indochina in the 1970s – as well as its role in the establishment of the international refugee protection architecture. In Chapter 2.1, I demonstrated how, far from supporting the indiscriminate provision of asylum to those in need, Australia's participation in the construction of the international system of refugee protection was carefully calibrated to protect its discriminatory immigration policies, the right to decide who could come to Australia and the circumstances under which they could come. These were rarely humanitarian. As observed in Chapter 2.1, with respect to the Jews and other displaced Europeans, and in Chapter 2.2, with respect to the Hungarians, West Papuans, Asian Ugandans and Vietnamese, Australia opened its doors to refugees only when it was in the national interest to do so and then reluctantly and selectively. Immigration requirements were used to control refugee intakes and select the most desirable immigrants amongst them while

special criteria for refugees often acted to restrict rather than facilitate their access to Australia's protection.

While the application of immigration criteria to refugees allowed Australia to limit demands upon its hospitality during this period, the spontaneous arrival of self-selecting refugees in the late 1970s after Australia had ratified the UN Refugee Convention presented new challenges, to which the Fraser Government is remembered as responding admirably. But in Chapter 3.1, I suggested that the Fraser era was not an exception to Australia's historical ambivalence to the provision of asylum. I argued that, while the Fraser Government's response to the Indochinese refugee crisis was generous in scope and humanitarian in outcome, the objectives and motives underpinning its policies were identical to those of subsequent Governments, its response driven more by political than humanitarian considerations. The Fraser Government was only prompted to act to help alleviate the refugee crisis in any significant way by the arrival of asylum seekers on Australian shores and the likelihood of more to follow, which threatened its chances of re-election. Rather than warmly welcoming refugees arriving by boat in large numbers, as it is sometimes suggested, the Government's actions – including boat holding arrangements with countries of first asylum combined with substantial resettlement quotas as well as tough legislation to target people smugglers and deter asylum seekers – were all aimed at stopping such arrivals. Ultimately Fraser's response served communitarian and cosmopolitan purposes at the same time and was thus effective from both political and humanitarian perspectives: opening up pathways to protection for refugees rather than denying them stopped the uncontrolled flow of boats that made the public so anxious and thus threatened his Government. However, it also had the effect of creating a pejorative distinction between self-selecting refugees and refugees selected for resettlement and constructing the proverbial "queue" that would be used by subsequent Governments to delegitimise the claims of unwanted asylum seekers.

Similarly, the role that the Labor Governments of Bob Hawke and Paul Keating played in establishing the punitive system for the reception and treatment of asylum seekers is often overlooked. Hawke is remembered, in particular, for his emotional pledge of refuge for the Chinese in Australia at the time of the Tiananmen Square massacre, while Keating is remembered as "a politician of unusually powerful imagination", who re-imagined Australia

as a confident, independent and multicultural nation.<sup>36</sup> A strong commitment to multiculturalism and closer engagement with the Asia Pacific region, however, did not mean that these Labor Governments were any more receptive to the asylum seekers arriving by sea from Indochina and China who sought refuge in Australia in the 1980s and 1990s. In Chapter 3.2, I reviewed the crucial role that the Hawke and Keating Governments played in the construction of the current border protection regime, trialling temporary protection (an option first explored by the Fraser Government and later employed by the Howard Government) and instituting mandatory detention for asylum seekers in remote locations in an attempt to curtail unwanted claims upon Australia's hospitality.

These policies and practises were later adopted and adapted by Howard – with more success – in response to the fourth wave of asylum seekers fleeing conflict and persecution in the Middle East at the turn of the millennium. That is to say, when Howard drew a line in the sand against boat-borne asylum seekers in 2001, he was not drawing a line between Australia's past and the present; he was upholding a longstanding bipartisan tradition. Howard's stand against the *Tampa* was opportunistic but it was neither inconsistent with the approach of previous Governments nor, as I showed in Chapter 4.1, with his approach to refugees from the beginning of his tenure. With respect to the Chinese denied asylum and the Kosovars, whose warm reception in Australia was tempered by its temporary nature and cold return, the Howard Government was equally determined to demonstrate that it alone would decide who could call upon the nation's hospitality.

Thus, as this thesis has carefully demonstrated, although it has claimed the "success" of its border protection policies as its own, credit for them and responsibility for their consequences does not belong to the current Coalition Government alone. Indeed, the Coalition has been quick to divest itself of responsibility for the consequences, arguing that it is simply cleaning up the "mess" caused by the prior Labor Governments.<sup>37</sup> As Part IV of

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<sup>36</sup> Robert Manne, 'The Road to *Tampa*', in Laksiri Jayasuriya, David Walker and Jan Gothard (eds), *The Legacies of White Australia: Race, Culture and Nation*, University of Western Australia Press, Perth, 2003, p. 173.

<sup>37</sup> See, for example, Peter Dutton, 'More Than 800 Days of No Illegal Boat Arrivals to Australia', media release, 10 October 2016, <http://pandora.nla.gov.au/pan/143035/20170323-1021/www.minister.border.gov.au/peterdutton/Pages/More-than-800-days-of-no-illegal-boat-arrivals-to->

this thesis makes clear, the Coalition is right to implicate the Rudd and Gillard Labor Governments in the consequences of these policies. It was under Labor that those now languishing in the South Pacific or facing permanent impermanence in Australia under the new temporary protection visa regime had arrived. In his first term, Rudd had promised to greet them with an “open heart”, detain them only as a last resort and to provide them with permanent protection. His promises, however, as Chapter 4.2 reveals, proved to be rhetorical only, his principles evaporating as the boats materialised. Rudd’s rhetoric was not entirely without consequence; his deliberate focus on people smugglers in his first term provided a more palatable enemy to justify tough policies that were popular with the public but targeted asylum seekers nonetheless. In his second stint as Prime Minister, Rudd stripped the last vestiges of hope from the refugees and asylum seekers now marooned in the Pacific with his decree that unauthorised arrivals would never be resettled in Australia, a policy to which the Turnbull Coalition Government now clings, on the grounds that any backward step might be seen as a “softening” that would signal a green light for people smugglers to resume their trade. (Indeed, in an attempt to reinforce this message the Turnbull Government tried to introduce a lifetime ban preventing unauthorised maritime arrivals who had been taken to a regional processing centre from ever entering Australia, even as a tourist or visitor.<sup>38</sup>) It was Gillard’s Government that re-established the political consensus amongst the two major parties on the necessity of offshore processing and re-opened the offshore processing centres on Manus Island and Nauru where all unauthorised arrivals since Rudd’s pronouncement have been sent, as detailed in Chapter 4.3. Gillard also bequeathed the current Government its moral reasoning – preventing deaths at sea – for the banishment and warehousing of refugees and asylum seekers there. An uncertain deal with the United States is, at present, the only hope those detained on Manus Island and Nauru have of escaping their Pacific purgatory.

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[Australia.html](#); accessed 19 April 2017; Dutton, ‘Moss Report’, media release, 20 March 2015, <http://www.minister.border.gov.au/peterdutton/2015/Pages/moss-report.aspx>; accessed 11 May 2017.

<sup>38</sup> Migration Legislation Amendment (Regional Processing Cohort) Bill 2016.



## Denied but not deterred

One of the clear lessons to emerge from this critical history is that punitive policies of *deterrence* do not and have never worked to deter refugees arriving by irregular means so long as the risks and dangers they flee outweigh what they face in doing so. The criminalisation of asylum that began under Fraser with its anti-trafficking legislation and continued under the Hawke and Keating Governments with the introduction of administrative detention under the former and mandatory detention under the latter punished but did not discourage asylum seekers. Mandatory detention did not prove to be the temporary circuit breaker it was intended to be. Rather than falling, the number of onshore asylum applications grew over the course of the next decade. Similarly, when the Howard Government changed the protection outcome for refugees arriving by boat in 1999 it did not reduce the number of people willing to accept temporary in place of permanent protection visas, punitive though they are. In fact, the number of people arriving by boat increased dramatically. What changed was the composition of the passenger lists of the boats, which included more women and children desperate to be reunited with their partners and fathers, as devastatingly revealed by the SIEV X tragedy in 2001. Offshore processing likewise failed to deter the tens of thousands who arrived after the Gillard Government re-instated it in 2012 since it was perceived – as it had turned out to be in its first iteration under Howard – as an offshore waiting room for resettlement in Australia. Ironically, the ineffectiveness of each of these policies guaranteed their longevity. But these punitive deterrence policies are effective in a different regard: they serve a potent symbolic role, a demonstration of the strength and resolve of the Government to protect its borders and control the fate of the nation.

What did work to stop the boats – for Howard in 2001 and for the Coalition since it regained power in 2013 – is the policies of *denial*. The inability to access Australia's protection changed the risk equation for boat-borne refugees. Quite simply, if there was no hope of protection in Australia, there was no point to trying. This is what Gillard attempted to do with the Malaysian Arrangement and the excision of the mainland, and what Rudd acknowledged in his second term with his PNG solution. This is what has worked to achieve the “success” of which the Abbott and Turnbull Governments now boast. Denial – of responsibility, of access, of protection, and ultimately of hope – is, as this thesis has shown, an Australian

tradition. Successive Australian Governments have avoided commitments to asylum in the first instance and denied it in the second. As an isolated island situated on the other side of the world to the major refugee-producing conflicts of the first half of the twentieth century, the nation historically relied upon the inability of refugees who might claim its protection to access Australia's territory. When Australia signed the Refugee Convention in 1954, it excused itself from the universal application of its terms, which meant that those who could access its territory were excluded from its commitments. It was thus able to regulate refugees by facilitating their access as migrants, who were required first and foremost to meet the nation's needs. But since it was first breached by boat-borne refugees who reached the mainland in 1976, subsequent Australian Governments have needed to innovate in order to reconstruct – legally and militarily – the historic moat that once protected Australia from self-selecting refugees. They have done this by legislating to exclude particular cohorts from their obligations (e.g. via safe third country legislation), employing the military to turn boats away, progressively excising Australian territory from the migration zone, and refusing to resettle refugees arriving by boat. These innovations fit within and build upon a tradition of denial and avoidance of asylum that has culminated in Australia's current brutal border protection regime.

Policies of denial might be successful at a local level, appeasing voter concerns about porous borders and security, but they contribute little to the resolution of the broader global refugee issue. Stopping the boats, the policy goal to which all Australian Governments without exception since Fraser have aspired, is not, as high profile lawyer and refugee advocate Julian Burnside points out, a self-evident good. "It might stop people drowning inconveniently in view of Australians at Christmas Island. But if they do not get on a boat and are, instead, killed by the Taliban, they are just as dead as if they drowned. The real difference", Burnside argues, "is that our conscience is not troubled by their un-noted death somewhere else."<sup>39</sup> The fact that the boats have been prevented from entering Australian territory and thus engaging Australia's humanitarian obligations does not mean people have ceased trying – or dying – in the attempt. UNHCR estimates that in 2014, 54,000 people undertook irregular

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<sup>39</sup> Julian Burnside, 'Without Justice There Will Not Be Peace', 2014 City of Sydney Peace Prize Lecture, Sydney Town Hall, 5 November 2014, <http://sydneypeacefoundation.org.au/wp-content/uploads/2015/01/2014-City-of-Sydney-Peace-Prize-Lecture-by-Julian-Burnside-AO-QC.pdf>; accessed 27 February 2015.

maritime voyages that passed through South-East Asia, most of whom departed from Bangladesh and Myanmar and were headed for Thailand and Malaysia. At least 540 are believed to have died on these journeys in 2014 and hundreds more are thought to have perished in smuggling camps in Thailand.<sup>40</sup> Since the commencement of Operation Sovereign Borders, at least 30 boats carrying 765 people have been intercepted and removed from Australian waters.<sup>41</sup> Australia has not stopped the boats; it has simply denied them and its duties towards their passengers that were once enshrined in the Refugee Convention and the Migration Act. It has pushed them back to sea and onto others – typically the poorest and least developed countries, which host the vast majority of the world’s 65 million refugees. Meanwhile it spends billions of dollars holding a couple of thousand asylum seekers in virtual captivity, halfway between persecution and protection.

The Australian way has made walls of water, rendered traditional maps useless and international treaties meaningless. It has cost lives and changed perceptions of Australia. And yet, it remains a source of pride for the Government and a model for export. Speaking in London in October 2015 (shortly after he was deposed by Malcolm Turnbull), Abbott suggested that the Australian way – “turning boats around ... denying entry at the border ...and ...establishing camps for people who currently have nowhere to go” – should be studied and adopted by European Governments. It was a job that required “toughmindedness” and deep pockets but, Abbott assured them, it was “the only truly compassionate thing to do”.<sup>42</sup> Following Australia’s example, Sweden, long regarded one of the most generous and welcoming nations for refugees, has introduced temporary protection

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<sup>40</sup> UNHCR Regional Offices for South-East Asia, ‘Irregular Maritime Movements in South-East Asia: January – November 2014’, <http://storybuilder.jumpstart.ge/en/unhcr-imm>; accessed 16 January 2015.

<sup>41</sup> See Janet Phillips, ‘Boat Arrivals and Boat “Turnbacks” in Australia Since 1976: A Quick Guide to the Statistics’, Parliamentary Library Research Paper, 17 January 2017, [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/BoatTurnbacks#](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks#); accessed 6 April 2017. DIPB, ‘Operation Sovereign Borders Monthly Update: March 2017’, media release, 7 April 2017, <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-march-4>; accessed 12 April 2017.

<sup>42</sup> Tony Abbott, Margaret Thatcher Lecture, Margaret Thatcher Centre Gala Dinner, London, 27 October 2015, transcript published in full in *Sydney Morning Herald*, 28 October 2015, <http://www.smh.com.au/comment/europe-should-learn-from-australia-how-to-halt-refugees-tony-abbott-20151027-gkkaop.html>; accessed 30 October 2015.

visas for refugees and stricter regulations on permanent residency and family reunion.<sup>43</sup> Hungary, a conduit to Austria and Germany for refugees, recently introduced mandatory detention for all asylum seekers.<sup>44</sup> The EU is considering the establishment of external processing centres along the lines of the Australian model<sup>45</sup> and there are growing calls to turn back, rather than rescue, boats in the Mediterranean.<sup>46</sup> If other wealthy Western nations continue to emulate the Australian example, the international system of refugee protection that was set up in the aftermath of the two World Wars will be defunct. It is for this reason that the study of Australian refugee policy, and the thorough scrutiny of its origins, its objectives, and its outcomes, is not only of domestic importance but also of major international significance.

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<sup>43</sup> Dan Bilefsky, 'Sweden Toughens Rules for Refugees Seeking Asylum', *New York Times*, 21 June 2016, [http://www.nytimes.com/2016/06/22/world/europe/sweden-immigrant-restrictions.html?smid=fb-nytimes&smtyp=cur&\\_r=0](http://www.nytimes.com/2016/06/22/world/europe/sweden-immigrant-restrictions.html?smid=fb-nytimes&smtyp=cur&_r=0); accessed 22 June 2016.

<sup>44</sup> Tom McTague, 'Hungary Hardens Immigration Line', *Politico*, 7 February 2017, <http://www.politico.eu/article/hungarys-new-hardline-immigration-scheme-viktor-orban-refugees-migration-crisis-europe/>; accessed 12 April 2017; Lili Bayer, 'Hungary Approves Mandatory Detention of All Asylum Seekers', *Politico*, 8 March 2017, <http://www.politico.eu/article/hungary-approves-mandatory-detention-of-all-asylum-seekers/>; accessed 12 April 2017.

<sup>45</sup> 'Australia's Brutal Treatment of Migrants' [editorial], *New York Times*, 3 September 2015, [http://mobile.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html?ref=opinion&\\_r=3&referrer](http://mobile.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html?ref=opinion&_r=3&referrer); accessed 4 September 2015; Ian Traynor, 'Brussels Plans Migration Centres Outside EU to Process Asylum Applications', *The Guardian*, 6 March 2015, <http://www.theguardian.com/world/2015/mar/05/european-commission-third-country-immigrant-processing-centres>; accessed 28 April 2015.


<sup>46</sup> See, for example, Katie Hopkins, 'Rescue Boats? I Would Use Gunships to Stop Migrants', *The Sun*, 17 April 2015; Bruno Waterfield for *The Times*, 'Germany to Follow Australia's Boat Turnbacks for Rescued Migrants', *The Australian*, 7 November 2016, <http://www.theaustralian.com.au/news/world/the-times/germany-to-follow-australias-boat-turnbacks-for-rescued-migrants/news-story/5e3b553e9d675a2f1bf4b6cfb6009d66>; accessed 7 November 2016.

## Appendix A: Copy of Published Version of Chapter 4.2

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# Joining the 'Race to the Bottom'

## The Rudd Government's 'Tough but Humane' Approach to Asylum Seekers

**Katrina Stats**

*Action springs not from thought, but from a readiness for responsibility.*

— Dietrich Bonhoeffer

### **Introduction**

In 2007, Labor leader Kevin Rudd's promise of a new 'tough but humane' approach for dealing with asylum seekers was a key point of difference between the two major parties that arguably contributed to his rise to power. It was the perceived failure of this strategy, among other things, that saw him replaced as Prime Minister by his deputy, Julia Gillard, in 2010. In 2013, during his second term as Prime Minister, the substantial increase in unauthorised boat arrivals was highlighted by the opposition as evidence of the failure of Rudd's 'soft' approach and undoubtedly contributed to his government's demise. Asylum-seeker policy was, once again, a key issue in the 2016 federal election, with Malcolm Turnbull's Coalition government repeatedly warning against a return to the 'soft' policies of the Rudd era.

However, as this article contends, most of the policy changes promised by Rudd in 2007 proved to be symbolic or rhetorical only. Border-protection measures were actually increased, offshore processing was maintained (on excised territory rather than in neighbouring countries), mandatory detention was retained, and the government's new detention guidelines were largely ignored. In 2013, Rudd introduced perhaps the most draconian and devastating measures to date with his Papua New Guinea solution, the tragic consequences of which have recently been seen in the self-harm of desperate and despairing asylum seekers marooned on Nauru and Manus Island. Rudd is still eulogised by some and damned by others for his 'soft' treatment of asylum seekers. This article thus provides an important corrective to the record. It demonstrates how Rudd's 'tough but humane' approach to asylum seekers failed not only according to the traditional measure of success — stopping the boats — but also according to its own objectives, that is, to respond to those seeking refuge in Australia in a more humane fashion.

### **The 2007 'Ruddslide'**

On 24 November 2007, Australians voted decisively for change. After almost twelve years in opposition, the Labor Party, led by Kevin Rudd, convincingly swept John Howard's Liberal-National Coalition from office in what was dubbed a 'Ruddslide'.<sup>1</sup> The ALP's approach to refugees and asylum seekers under Rudd was a point of policy difference that arguably contributed to its election victory and characterised the new government in the early days of its incumbency. Although Rudd supported the mandatory detention of asylum seekers and deterrence policies such as the interdiction and turning back of asylum-seeker boats at sea,<sup>2</sup> during the election campaign he decried the Howard government's Pacific Solution to the asylum-seeker 'problem' as 'just wrong' and 'a waste of taxpayers' money' and promised to end it.<sup>3</sup>

Since the implementation of the Pacific Solution in late 2001, boat arrivals had been negligible; a mere eighteen boats carrying fewer

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1 M. Schubert, 'A Rumble, Then a Ruddslide', *The Age*, 25 November 2007.

2 P. Kelly and D. Shanahan, 'Rudd to Turn Back Boatpeople', *The Australian*, 23 November 2007.

3 K. Rudd, interview with Kerry O'Brien, *7:30 Report*, 21 November 2007, <<http://www.abc.net.au/7.30/content/2007/s2096954.htm>>, accessed 1 December 2007.

than 300 asylum seekers arrived between 2002–07, in contrast to the 5516 irregular maritime arrivals (IMAs) who had arrived in 2001 alone.<sup>4</sup> As a result, by 2007 ‘illegal immigration’ had diminished as a pressing issue in the minds of the public.<sup>5</sup> Instead, research highlighting the human and financial costs of the Pacific Solution began to gain traction in the media, the \$1 billion price tag for outsourcing the processing of fewer than 1700 asylum seekers over six years appearing increasingly exorbitant and excessively hard-hearted.<sup>6</sup> A shift in community concerns from the effectiveness to the effects of the Howard government’s policies allowed for a change in the political rhetoric, which Rudd, who positioned himself as a compassionate humanitarian in contrast to Howard’s reputation as a hard-nosed realist, sought to exploit.

## The Good Samaritan

Rudd’s position on asylum was explicitly informed by his Christian beliefs. Back in 2006, before he had wrested the Labor leadership from then-opposition leader Kim Beazley, Rudd wrote of his respect for the German theologian Dietrich Bonhoeffer, ‘without doubt, the man I admire most in the history of the twentieth century’.<sup>7</sup> Bonhoeffer had helped to organise the evacuation of German Jews fleeing the Nazis to Switzerland in the early 1940s. It was his involvement in these efforts that saw him arrested before he was later implicated in, and executed for, his role in a plot to assassinate Hitler. Dietrich Bonhoeffer, Rudd explained, was, above all,

... a man of action who wrote prophetically in 1937 that ‘when Christ calls a man, he bids him come and die.’ For Bonhoeffer,

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4 Calculated from data supplied to M. Hutton, ‘Suspected Irregular Entry Vessels (SIEVs) 1–374, 7 September 2001 – 15 July 2012’, *SIEVEX.com*, <<http://sievx.com/dbs/boats/SIEVS1to374.pdf>>, accessed 17 May 2013.

5 ‘Illegal immigration’ had rated in the top five issues for 17 per cent of respondents in an AustraliaSCAN survey in 2003 (when the polling series had begun), but by 2007 this had dropped to just 7 per cent — M. Goot and I. Watson, *Population, Immigration and Asylum Seekers: Patterns in Australian Public Opinion*, Pre-election Policy Unit, Department of Parliamentary Services, Parliament of Australia, May 2011, <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/~//media/05%20About%20Parliament/54%20Parliamentary%20Depts/544%20Parliamentary%20Library/Pub\\_archive/Goot.ashx](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/~//media/05%20About%20Parliament/54%20Parliamentary%20Depts/544%20Parliamentary%20Library/Pub_archive/Goot.ashx)>, accessed 20 April 2012.

6 K. Bem, N. Field, N. Maclellan, S. Meyer and T. Morris, *A Price Too High: The Cost of Australia’s Approach to Asylum Seekers*, A Just Australia, Oxfam Australia and Oxfam Novib, August 2007, <<http://www.ajustaustralia.com/resource.php?act=attache&id=213>>, accessed 13 January 2012, p. 4.

7 K. Rudd, ‘Faith in Politics’, *The Monthly*, no. 17, October 2006, <<http://www.themonthly.com.au/tm/?q=node/300>>, accessed 10 September 2008.



whatever the personal cost, there was no moral alternative other than to fight the Nazi state with whatever weapons were at his disposal.<sup>8</sup>

In line with Bonhoeffer's teachings, Rudd argued that the core principle shaping Christianity's engagement with the state should be that it 'always take the side of the marginalised, the vulnerable and the oppressed', and that this should 'help to shape our view of what constitutes appropriate policy for the community, the nation and the world'.<sup>9</sup> Acknowledging that asylum seekers presented one of the great challenges of this era, Rudd argued that '[t]he biblical injunction to care for the stranger in our midst is clear'.<sup>10</sup> Rudd urged Australians to

... never forget that the reason we have a UN convention on the protection of refugees is in large part because of the horror of the Holocaust, when the West (including Australia) turned its back on the Jewish people of Germany and the other occupied countries of Europe who sought asylum during the '30s.<sup>101</sup>

In 2007, as opposition leader, Rudd declared himself to be 'a great believer' and 'passionate defender' of the 1951 United Nations Convention Relating to the Status of Refugees.<sup>12</sup> 'If you look at the history of the convention,' Rudd reminded us, 'it came about because after World War II we resolved that we will never stand idly by and allow something like the Holocaust to unfold'.<sup>13</sup> He was determined to

... make sure this country maintains an open heart ... if we, as one of the initiators of the post-war Refugee Convention consensus, are seen to be fragmenting it at the edges, we are also part and parcel of fragmenting the global consensus and machinery for dealing with refugee challenges into the future. I never want to be part of a government that does that.<sup>14</sup>

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8 Rudd, 'Faith in Politics'.

9 Rudd, 'Faith in Politics'.

10 Rudd, 'Faith in Politics'.

11 Rudd, 'Faith in Politics'.

12 Rudd, interview with Kerry O'Brien, 21 November 2007.

13 Rudd, interview with Kerry O'Brien, 21 November 2007.

14 Kevin Rudd, quoted in D. Marr, 'The Political Journey of Kevin Rudd', *Quarterly Essay*, vol. 38, 2010, pp. 66–7.

## Dismantling the Pacific Solution

All this suggested that Rudd believed in a very different approach to asylum seekers than that of the Howard government, which had sought to close every avenue available to asylum seekers, repudiating and retreating from the international system of refugee protection.<sup>15</sup> And indeed, after its stunning election victory, the Rudd government immediately set about dismantling the Pacific Solution as promised.

With the closure of the detention facilities on Manus Island and Nauru in February 2008, the new Minister for Immigration, Chris Evans, declared a 'shameful and wasteful chapter in Australia's immigration history' over.<sup>16</sup> Processing of asylum seekers would now take place on Australian territory, namely Christmas Island, although this remained excised from the migration zone. In July 2008, Evans announced a new risk-based approach to detention. Mandatory detention was retained for all unauthorised boat arrivals — a pre-election pledge — but was to be guided by a new set of values: it was to be used only as 'a last resort and for the shortest time practicable'.<sup>17</sup> The onus would be on the Department of Immigration to justify continued detention, which would be subject to quarterly reviews, and detainees would now have access to publicly funded legal assistance and independent review of negative assessments.<sup>18</sup> The 'presumption of detention'<sup>19</sup> was to be replaced with the assumption that, after a brief period of detention for identity, health and security checks, asylum seekers would be housed in the community while their claims were processed.

Children would not be subject to detention regardless of the circumstances of their arrival.<sup>20</sup> Temporary Protection Visas (TPVs),

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15 See K. Stats, 'We Will Decide: Refugee and Asylum Policy during the Howard Era before Tampa', *Australian Studies*, vol. 7, 2015.

16 C. Evans, 'Rebuilding Confidence and Integrity in Australia's Immigration System', address to the 2008 National Members' Conference of the Migration Review Tribunal and Refugee Review Tribunal, 29 February 2008, <<http://www.minister.immi.gov.au/media/speeches/2008/ce08-29022008.htm>>, accessed 4 September 2008.

17 C. Evans, 'New Directions in Detention: Restoring Integrity to Australia's Immigration System', speech delivered to the Centre for International and Public Law, the Australian National University, 29 July 2008, <<http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>>, accessed 9 September 2008.

18 Evans, 'New Directions in Detention'.

19 Joint Standing Committee on Migration, *Immigration Detention in Australia: A New Beginning — Criteria for Release from Detention*, Canberra, Commonwealth of Australia, December 2008, <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=mig/detention/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/detention/report.htm)>, accessed 1 May 2016, pp. viii and xi.

20 C. Evans, 'Labor Unveils New Risk-based Detention Policy', media release from the Department of Immigration, 29 July 2008, <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08072.htm>>, accessed 20 September 2008.

which had denied their beneficiaries (refugees who had arrived in an unauthorised manner) permanent residency, the right to work and access to social services such as Medicare and Centrelink, as well as the right to sponsor family members' claims for asylum, were abolished in August 2008. They were replaced by a resolution of status visa, which granted unauthorised asylum seekers the same suite of benefits and entitlements as permanent protection visa-holders. In March 2009, Evans announced an end to charging asylum seekers for their enforced and indefinite detention, a practice unique to Australia (and to immigration detention — even criminals were not charged for their incarceration) that had been introduced with mandatory detention by the Keating Labor government.<sup>21</sup> The so-called 45-day rule, which prevented asylum seekers who did not apply for refugee status within forty-five days of their arrival in Australia from working, was scrapped from July 2009.<sup>22</sup> In addition to these reforms, the government increased the humanitarian quota by 500 places in 2008–09 and by a further 250 in 2009–10.

As well as these policy measures, there was a deliberate attempt to reframe the asylum debate. In accordance with Rudd's professed beliefs about society's duty to care for the vulnerable stranger, the government explicitly repudiated the demonisation of asylum seekers, who had been cast as a criminal and cultural threat by the previous government.<sup>23</sup> However, if there was one lesson the new government had taken from the Howard period, it was that the public responded to a government committed to strong border security, especially in the post-9/11 era. And so, instead of denigrating asylum seekers, it targeted people smugglers, identified by Minister for Home Affairs Brendan O'Connor as one of five key threats to the nation (along with terrorism, smuggling of illicit goods, biosecurity risks and illegal foreign fishing).<sup>24</sup> Rudd himself was especially vehement in this respect, declaring:

People smugglers are engaged in the world's most evil trade

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21 C. Evans, 'Detention Debt Regime to be Scrapped', media release from the Department of Immigration, 18 March 2009, <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09031.htm>>, accessed 16 February 2013.

22 C. Evans, 'Migration Changes from 1 July', media release from the Department of Immigration, 1 July 2009, <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09061.htm>>, accessed 16 February 2013.

23 See C. Evans, 'Refugee Policy under the Rudd Government — The First Year', address to the Refugee Council of Australia, 17 November 2008.

24 Brendan O'Connor, cited in Y. Narushima, '98 More Asylum Seekers off to Christmas Island', *The Age*, 24 September 2009.

and they should all rot in jail because they represent the absolute scum of the earth ... People smugglers are the vilest form of human life. They trade on the tragedy of others and that's why they should rot in jail and in my own view, rot in hell.<sup>25</sup>

Thus, there was a distinct shift from the 'deliberately tough' regime of the Howard government<sup>26</sup> to a new 'tough but humane' approach to border control and asylum seekers.<sup>27</sup> Evans explained: 'We firmly believe that we can have strong and effective border security while also treat[ing] people seeking our protection with fairness and humanity'.<sup>28</sup> The 'tough' aspects of the new policies targeted people smugglers, while the 'fair' and 'humane' detention policies were designed to improve the lot of their unfortunate passengers. This allowed the government to continue with the popular strong border-control measures (surveillance, interdiction, criminalisation) while maintaining a clear distinction between it and its predecessor in its treatment of vulnerable asylum seekers.

In the absence of significant numbers of IMAs — just 148 and 161 in 2007 and 2008 respectively — these changes were relatively uncontroversial and were generally well received. 'Labor's audacious experiment'<sup>29</sup> was promoted and perceived as being more humane, in keeping with Australia's humanitarian obligations, and more in line with Australia's tradition of liberal internationalism. The changes were described by Evans as 'returning humanity and fairness to Australia's refugee policies'<sup>30</sup> and were praised by refugee advocates as 'humane and sensible reforms'.<sup>31</sup> Paul Power, CEO of the Refugee Council of Australia, described these steps as 'the most positive and far-reaching change in Australian history to policies relating to asylum seekers',<sup>32</sup> while in 2008 the United

25 Kevin Rudd, quoted in E. Rodgers, 'Rudd Wants People Smugglers to "Rot in Hell"', *ABC News*, 17 April 2009, <<http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814>>, accessed 17 April 2009.

26 P. Ruddock, 'Australian Government Position on the MV Tampa Refugees', *Online Opinion*, 15 October 2001, <<http://www.onlineopinion.com.au/view.asp?article=1942>>, accessed 23 October 2012.

27 See, for example, K. Rudd, interview with Kerry O'Brien, *7:30 Report*, 22 October 2009, <<http://pandora.nla.gov.au/pan/79983/20091030-1529/www.pm.gov.au/node/6269.html>>, accessed 17 January 2013.

28 Evans, 'Refugee Policy under the Rudd Government'.

29 P. Kelly, 'Rudd's Softer Stance Mugged by Reality', *The Australian*, 17 October 2009.

30 Evans, 'Refugee Policy under the Rudd Government'.

31 P. Aristotle, 'Let's Give "Softer" Approach for Those Seeking Asylum a Chance', *The Age*, 13 October 2008.

32 P. Power, 'Which Way Forward? Refugee, Security and the Asia-Pacific', speech to the ALP National Conference Fringe Event, 31 July 2009, <[http://www.refugeecouncil.org.au/docs/resources/0907\\_ALP\\_Fringe.pdf](http://www.refugeecouncil.org.au/docs/resources/0907_ALP_Fringe.pdf)>, accessed 1 March 2013.

Nations High Commissioner for Refugees, Antonio Guterres, reportedly described Australia as a 'model asylum country', acknowledgement of considerable change since the Howard era of which it had been so critical.<sup>33</sup>

## The Indian Ocean Solution

However, despite the fanfare, key elements of the previous government's asylum policies remained. Insisting that '[s]trong border security and humane and risk-based detention policies [were] not incompatible',<sup>34</sup> the Rudd government abolished or softened only those aspects that effectively punished asylum seekers after they arrived, such as detention debt and the exclusive issuing of TPVs, but did not significantly alter any of the policies that limited access to Australia's asylum system in the first place.

The government boasted that it 'remain[ed] committed to strong border security, tough anti-people smuggling measures and the orderly processing of migration to our country'<sup>35</sup> and maintained border patrols at existing levels. It did not reverse the excision of outlying territory from Australia's migration zone and opened new detention facilities (commissioned by the Howard government) on the excised territory of Christmas Island for offshore (or, at least, off-mainland) processing, arguing that this would 'signal that the Australian Government maintains a very strong anti people-smuggling stance'.<sup>36</sup> And while it ended the Pacific Solution when it wound down processing on Nauru and Manus Island, the government did not repeal section 198A of the *Migration Act* 1958 (Cth), which provided the statutory basis for 'offshore entry persons' to be taken to a declared country for processing.<sup>37</sup> This was not an inconsequential oversight: it allowed for the reinstatement of offshore processing under the subsequent Gillard government in 2012 and its extension to indefinite offshore processing with no chance of resettlement in Australia — perhaps

<sup>33</sup> Antonio Guterres, quoted in Evans, 'Refugee Policy under the Rudd Government'.

<sup>34</sup> Evans, 'New Directions in Detention'.

<sup>35</sup> C. Evans, 'Sri Lankans Granted Humanitarian Entry', media release from the Department of Immigration, 11 January 2008, <<http://www.minister.immi.gov.au/media/media-releases/2008/ce08003.htm>>, accessed 12 September 2008.

<sup>36</sup> Evans, 'New Directions in Detention'.

<sup>37</sup> See E. Karlsen, *Developments in Australian Refugee Law and Policy 2007–10*, Department of Parliamentary Services, Parliament of Australia, 18 October 2010, <[http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/296071/upload\\_binary/296071.pdf;fileType=application%2Fpdf#search=%22library/prspub/296071%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/296071/upload_binary/296071.pdf;fileType=application%2Fpdf#search=%22library/prspub/296071%22)>, accessed 1 March 2013.

the most draconian policy innovation yet — under Rudd in his second term as Prime Minister in 2013. Certainly, the Rudd government increased the legal avenues for resettlement in Australia by increasing the humanitarian intake modestly by 750 places. However, the humanitarian program nevertheless diminished as a proportion of the overall immigration intake, from an average of 12 per cent during the Howard era to just 7 per cent during Rudd's first term in office.<sup>38</sup>

The maintenance of the excision of territory and offshore processing was significant, as Paul Power notes, since it was a policy conceived in the immediate aftermath of the September 11 attacks, a period of heightened fear and insecurity when it was suggested that there were possible links between asylum-seeker movement and global terrorism, fears that have since proven unwarranted.<sup>39</sup> The continuation of these policies nonetheless implied that asylum seekers arriving by boat were a threat to be kept at a distance, out of sight and out of mind. A consequence of this was that those asylum seekers (who were typically the most vulnerable<sup>40</sup> and also the most likely to be found to be refugees) had fewer rights than those processed on the mainland. Although, under Evans' direction, asylum seekers processed on Christmas Island were now provided with access to legal assistance, review of negative asylum decisions and external scrutiny by the Immigration Ombudsman, the government still discriminated against those processed offshore by denying them recourse to merits or judicial review via the Refugee Review Tribunal and the courts. To critics, it seemed like the new government had merely replaced the Pacific Solution with the Indian Ocean Solution.<sup>41</sup>

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38 Calculated from numbers taken from Table 1 in J. Phillips, M. Klapdor and J. Simon-Davies, *Migration to Australia Since Federation: A Guide to the Statistics*, Department of Parliamentary Services, Parliament of Australia, 29 October 2010, <<http://www.aph.gov.au/binaries/library/pubs/bn/sp/migrationpopulation.pdf>>, accessed 23 July 2012, p. 13.

39 Power, 'Which Way Forward?'

40 Research comparing the experiences of Tamil refugees in detention and the community showed that those arriving in an unauthorised manner and detained as a result had higher levels of pre-migration trauma (hence, perhaps, their propensity to resort to desperate measures to seek refuge) than compatriots who arrived in an authorised manner either as migrants, resettled refugees or asylum seekers and were thus not subject to immigration detention — M. Thompson and P. McGorry, 'Maribyrnong Detention Centre Tamil Survey', in D. Silove and Z. Steel (eds), *The Mental Health and Well-being of Onshore Asylum Seekers in Australia*, Sydney, University of New South Wales, 1998, pp. 27–31; D. Silove, Z. Steel, P. McGorry et al., 'Trauma Exposure, Postmigration Stressors, and Symptoms of Anxiety, Depression and Posttraumatic Stress in Tamil Asylum Seekers: Comparisons with Refugees and Immigrants', *Acta Psychiatrica Scandinavica*, vol. 97, 1998.

41 See, for example, remarks by David Manne of the Refugee and Immigration Legal Centre, quoted in P. Maley, 'Pacific Solution Sinks Quietly', *The Australian*, 9 February 2008.

Mandatory detention, although softened around the edges, was retained as 'an essential component of strong border control'<sup>42</sup> and the government reaffirmed its commitment to the policy at every available opportunity. It largely failed to deliver on its grand promises of 'new directions' and values in immigration detention. The Migration Amendment (Immigration Detention Reform) Bill 2009, designed to embed Labor's risk-based approach to detention in law, languished as a surge of new boat arrivals that started in earnest in April 2009 (see Figure 1) rendered it too politically risky to pursue.<sup>43</sup> The government's commitment to using detention as a last resort and only for the shortest time possible thus proved to be aspirational only. Long-term detention continued,<sup>44</sup> indefinite detention remained possible, and children remained in detention or in 'alternative places of detention' where their freedom was similarly restricted.<sup>45</sup>

At the end of the Rudd government's first term in power there were, in fact, 674 children in immigration detention on the Australian mainland and Christmas Island combined.<sup>46</sup> In 2009, the United Nations Human Rights Committee expressed concerns about the policy and recommended that the Australian government 'consider abolishing the remaining elements of its mandatory immigration detention policy' and 'closing down the Christmas Island detention centre'.<sup>47</sup> Indeed, housing asylum seekers in the community while their claims were heard may have helped ease the detention crisis caused by an increase in boat arrivals in 2009 (see Figure 1). Instead, the Rudd government

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42 See Evans, 'New Directions in Detention'.

43 The Bill subsequently lapsed in July 2010 when the House of Representatives was prorogued for the 2010 federal election.

44 At the end of October 2011, 39 per cent of detainees had been in detention for more than twelve months — Department of Immigration and Citizenship (DIAC), 'Immigration Detention Statistics Summary', 31 October 2011, <[http://www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20111031.pdf](http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20111031.pdf)>, accessed 29 November 2011.

45 As of 11 October 2010, there were 723 children in immigration detention in Australia and Christmas Island — J. Stewart, 'Children Remain in Immigration Detention', *Lateline*, 11 October 2010, <<http://www.abc.net.au/lateline/content/2010/s3035511.htm>>, accessed 11 October 2010.

46 Department of Immigration and Citizenship (DIAC), 'Immigration Detention Statistics Summary', 30 July 2010, <[http://pandora.nla.gov.au/pan/115165/20100909-0031/www.immi.gov.au/managing-australias-borders/detention/\\_pdf/immigration-detention-statistics-20100730.pdf](http://pandora.nla.gov.au/pan/115165/20100909-0031/www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-20100730.pdf)>, accessed 30 March 2015.

47 United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Australia*, New York, United Nations, CCPR/C/AUS/CO/5 2009, 7 May 2009, <<http://www1.umn.edu/humanrts/hrcommittee/australia2009.html>>, accessed 16 April 2013.

simply expanded detention facilities to accommodate more detainees, devoting \$202 million over five years to the task in the 2010–11 budget.<sup>48</sup>

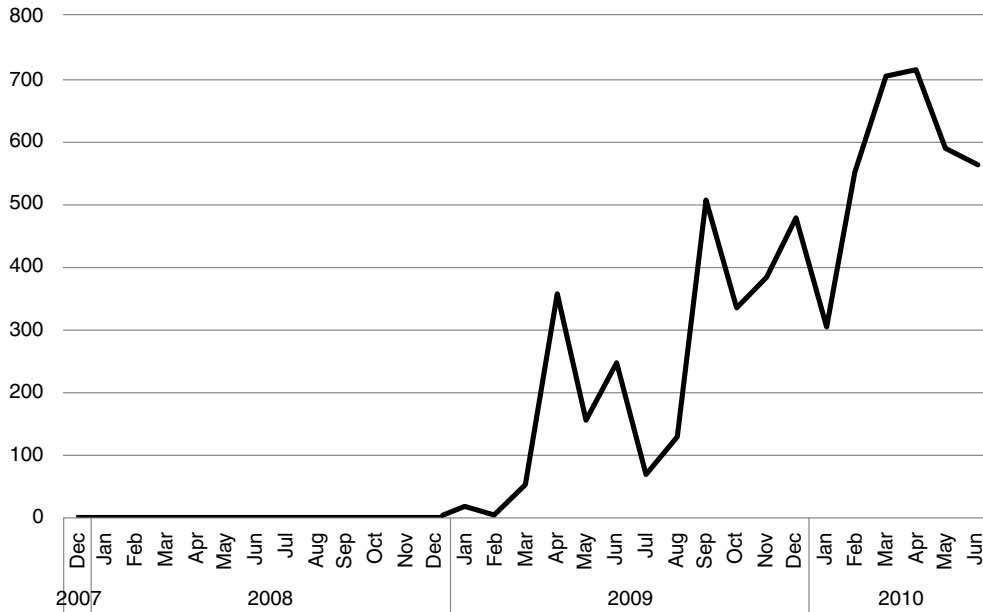


Figure 1: Asylum Seekers Arriving by Boat, December 2007 – June 2010.<sup>49</sup>

The abolition of detention debt was a token gesture. In reality, the collection of debts was rarely pursued, even during the Howard era, and what was collected cost more to recover than the revenue it generated; it was, therefore, as Liberal Senator Judith Troeth suggested, merely ‘a blot on our statute book’.<sup>50</sup> Likewise, the closure of Nauru in February 2008, which marked the end of the Pacific Solution, was largely symbolic since by that time there were few detainees left on the island and few new arrivals. Further, as noted, offshore processing, for all intents and purposes, continued; it was simply shifted to excised Australian territory rather than being outsourced to Pacific neighbours. The futility of this arrangement was not lost on observers. As Robert Manne pointed out, as had been the case with the Pacific Solution:

If asylum seekers reach Christmas Island and are found to be

<sup>48</sup> Parliamentary Library, *Budget Review 2010–11*, Department of Parliamentary Services, Parliament of Australia, May 2010, <<http://www.aph.gov.au/library/pubs/RP/BudgetReview2010-11/index.htm>>, accessed 2 August 2011.

<sup>49</sup> Data source: Hutton, ‘Suspected Irregular Entry Vessels (SIEVs)’.

<sup>50</sup> J. Troeth, Second Reading Speech for the Migration Amendment (Abolishing Detention Debt) Bill [No. 2], Commonwealth of Australia Parliamentary Debates, Senate, 8 September 2009, <[http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-09-08/0005/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-09-08/0005/hansard_frag.pdf;fileType=application%2Fpdf)>, p. 5887.



refugees, Australia will have no alternative but to settle them. It is inconceivable that other countries will offer homes to refugees already on Australian territory. The hope of the government is, however, that because of the success of the Howard government's brutal deterrence policy, people smugglers will continue to give Australia a wide berth.<sup>51</sup>

The government's 'tough but humane' approach to border control and asylum seekers was canny, in that it allowed the government to swing whichever way the winds of public opinion were blowing; but, for this very reason, it had no lasting effect on the political narrative. Rudd used his determination to stamp out 'the world's most evil trade' to justify the maintenance of a 'hard-line, tough, targeted approach to maintaining border protection for Australia', dedicating 'more resources to combat people smuggling than any other government in Australian history'.<sup>52</sup>

The irony of Rudd's veneration of Bonhoeffer, whose admirable feats included smuggling German Jews across the border to Switzerland in the 1940s, in the context of his unequivocal loathing of contemporary people smugglers, did not go unnoticed.<sup>53</sup> As Chris Bisset noted, Rudd's categorisation of people smugglers as the 'scum of the earth' was, at least, 'a more considered view than that of the Howard government which classed them as facilitators of evil queue jumping by people prepared to throw their children overboard to gain entry into the lucky country'.<sup>54</sup> In effect, however, the vilification of people smugglers merely served as a proxy for the vilification of asylum seekers, who continued to be punished by policies ostensibly targeting those who facilitated their journeys. The endgame remained the same: to stop the boats. Kevin Rudd's 'tough but humane' slogan thus proved to be little more than a riff on the Howard government's approach. Ultimately, the government's promise to take a more compassionate, principled approach to asylum seekers was only realised when it was not relevant — that is, while asylum seekers were an abstract rather than a real issue.

51 R. Manne, 'What Is Rudd's Agenda?', *The Monthly*, November 2008.

52 Kevin Rudd, quoted in CNN, 'Rudd: Human Smugglers "Scum of the Earth"', *CNN International/Asia*, 18 April 2009, <<http://edition.cnn.com/2009/WORLD/asiapcf/04/17/rudd.refugees/index.html>>, accessed 30 August 2009.

53 See, for example, G. Rundle, 'Rudd's Hero was a People Smuggler', *Crikey*, 23 April 2009; M. Epis, 'Rudd's Hero, the People Smuggler', *The Sydney Morning Herald*, 20 October 2009.

54 C. Bisset, 'In Defence of People Smugglers', *Eureka Street*, 15 October 2009, <<http://www.eurekastreet.com.au/article.aspx?aeid=17090>>, accessed 5 March 2013.

This became more apparent as unauthorised boat arrivals increased in 2009, providing the first real test of the effectiveness of Labor's humanitarian rhetoric and its commitment to strong border control. The number of asylum seekers arriving by boat jumped to nearly 3000 in 2009 and showed no signs of abating (see Figure 1). As the flow of boats increased, so too did public disquiet. A Lowy Institute poll in early October 2009 revealed that 76 per cent of Australians were 'somewhat' (33 per cent) or 'very' (43 per cent) concerned about unauthorised arrivals.<sup>55</sup>

The situation came to a head that month as the number of detainees on Christmas Island swelled beyond its capacity to hold them and the government contemplated transferring detainees to the mainland for processing, despite having pledged during the 2007 election to keep asylum seekers offshore. The opposition suggested that the renewed flow of asylum seekers arriving in boats was a direct result of the 'softening' of asylum policy under Rudd. The former foreign minister under Howard, Alexander Downer, accused Rudd of having undone '[a]ll the hard work by the Howard Government' and suggested that all the government was doing was 'encouraging more people to embark on the perilous journey by small boat to Australia in defiance of our laws'.<sup>56</sup> Opposition leader Malcolm Turnbull coined the phrase 'rolling out the Rudd carpet' for asylum seekers,<sup>57</sup> and called for the reintroduction of TPVs, re-branded as non-permanent visas (NPVs), for all boat arrivals as a deterrent. Former immigration minister Philip Ruddock suggested that Rudd had opened 'a pipeline of 10,000 [asylum seekers] a year or more',<sup>58</sup> while other senior Liberal Party figures suggested the boats might be harbouring terrorists, diseases and criminals, heightening the threat rhetoric.<sup>59</sup>

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55 See P. Maley and D. Guest, 'No Vacancy for Boatpeople as Kevin Rudd Toughens Stance', *The Australian*, 14 October 2009.

56 A. Downer, 'On the Road Again', *The Advertiser*, 22 March 2010.

57 L. Vasek, 'Rudd Attacks Turnbull's "Dot Points" on Border Protection', *The Australian*, 13 November 2009.

58 Philip Ruddock, quoted in P. Maley and A. O'Brien, 'Philip Ruddock Predicts Flood of 10,000 Boatpeople', *The Australian*, 13 October 2009.

59 See 'Tuckey Warns of Terrorists among Asylum-Seekers', *The Australian*, 22 October 2009; also remarks by WA Premier Colin Barnett and Liberal Senator David Johnston, quoted in M. Grattan and L. Murdoch, 'Chaos as Jakarta Diverts Asylum Boat', *The Age*, 23 October 2009.

## Rudd's Indonesian Solution

A year earlier, while proudly citing all of the Rudd government's improvements to refugee and asylum policy in an address to the Refugee Council of Australia, Minister for Immigration Chris Evans had pointed out that

... however comprehensive the protection and border security arrangements we have in place, we will still see people coming to this country unauthorised, either by boat or by plane. We did under the last government and we will under this one. *What is important is how we respond.*<sup>60</sup>

He suggested that his government's response would be 'calm and measured'.<sup>61</sup> In fact, the government's response to this new boat 'crisis' was as reactive and harried as that of its predecessor in 2001, and ultimately less successful in its aims.

In October 2009, when the government received warning that a boat carrying 255 Sri Lankan asylum seekers was heading to Australia, Rudd negotiated directly with the Indonesian President, Susilo Bambang Yudhoyono, for Indonesian authorities to intercept the vessel and detain its passengers. The boat was taken to Merak, where its passengers, including thirty-one children, refused to disembark. Instead, they began a hunger strike, which, thanks to some media-savvy and articulate spokespeople, garnered the attention of the international media. Australian authorities reportedly requested that Indonesia prevent journalists from accessing the ship, to which Indonesia's Director of Diplomatic Security, Dr Sujatmiko, indignantly replied: 'We have a democratic view of how the press works ... What's more, this is my country, not yours'.<sup>62</sup> The media took full advantage of this unprecedented access to a group of people usually represented by long shots of boats and impersonal, dispassionate accounts of their plight. The asylum seekers were named and photographed up close by the media and returned the favour with eloquent and emotional sound bites that, as Sophie Black observed, made them seem just like us, only in a more desperate situation:

If you had no place, if you had no country of your own, what

<sup>60</sup> Evans, 'Refugee Policy under the Rudd Government', emphasis added.

<sup>61</sup> Evans, 'Refugee Policy under the Rudd Government'.

<sup>62</sup> S. Fitzpatrick, 'Jakarta Fearful of Asylum-Seeker Fallout', *The Australian*, 7 November 2009.

would you do? And how long would you stay in a boat before you were able to enter a country that will give you asylum? We are not animals. We are not dogs. We are not stray dogs. We are people without a country to live in.<sup>63</sup>

They spoke of their professions as accountants, carpenters and IT experts, which helped to support their claim that they were not economic migrants but rather a persecuted minority.<sup>64</sup> More than 100 had already been recognised by the UNHCR as refugees. With their measured yet desperate pleas to the Australian government to come to their aid, the Merak asylum seekers turned attention unfavourably towards Australia's policies.

Less than a week later, with the Merak situation still unresolved, the Australian navy responded to a distress call from another group of seventy-eight Sri Lankan asylum seekers in international waters within Indonesia's search-and-rescue zone. The asylum seekers were ethnic Tamils, most of whom had been recognised by the UN office in Jakarta as refugees but who, their resettlement prospects remaining bleak, had taken matters into their own hands and hired a people smuggler to take them to Australia. They were subsequently transferred to an Australian customs vessel, the *Oceanic Viking*, where they remained while the Australian and Indonesian governments debated whose responsibility they were. Although Indonesia was the lead search-and-rescue authority for the area where they were found, it was an Australian ship that responded to the call and now harboured the asylum seekers. As a signatory to the Refugee Convention, Australia had its non-refoulement obligations to consider. However, sweltering under the hot gaze of the media due to the Merak stand-off and facing building domestic pressure about the growing numbers of irregular maritime arrivals, the Australian government was desperate for Indonesia to accept responsibility for the group.

At the time of these events, Rudd was enjoying what were described as 'totalitarian-like'<sup>65</sup> approval ratings, reaching a high of 71 per cent in an *Age*/Nielsen poll in early October 2009.<sup>66</sup> Such

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63 One of the spokespeople for the group of asylum seekers, 'Alex', quoted in S. Black, 'Meet Alex and Brindha: A Media Savvy Bunch of Boat People', *Crikey*, 16 October 2009.

64 See T. Allard, 'Boat People Shun Fluids in Stand-Off', *The Age*, 17 October 2009.

65 F. Hanson, 'Who's the Fairest of Them All?', *The Interpreter*, 19 October 2009, <<http://www.lowyinterpreter.org/post/2009/10/19/Who-is-the-fairest-of-them-all.aspx>>, accessed 20 October 2009.

66 M. Grattan, 'Turnbull's Joe Blow: Hockey the Front Runner', *The Age*, 12 October 2009.

popularity is a rare privilege that provides leaders with an opportunity to eschew populist policies in favour of principled politics, something Rudd had spoken of with great conviction before becoming Labor leader. In an interview with Geraldine Doogue in 2005, for example, he had spoken fervently of 'our responsibility to our fellow man through the agency of the state', and of the importance of staying true to one's own conscience.<sup>67</sup> He acknowledged the dilemma sometimes posed by conflicts between '[q]uestions of conscience as opposed to the inherent compromise of the political process'<sup>68</sup> but defended his view that 'any person in the public political process must first and foremost answer to their conscience'.<sup>69</sup> In terms of asylum policy, this was easy while boat numbers were low and the public was on side. However, as numbers rose and the public mood shifted, so too did Rudd's convictions.

Perhaps sensing his own *Tampa* opportunity and hoping to consolidate his leadership before the 2010 election in the way Howard had in 2001,<sup>70</sup> or, alternatively, fearing an issue on which the opposition had demonstrated it could make good capital, Rudd instead adopted a 'hard-line' stance against the asylum seekers' demands for which, he declared, his government would 'make no apology'.<sup>71</sup> After a face-to-face meeting, Rudd was able to persuade President Yudhoyono to temporarily accept the *Oceanic Viking* passengers for processing, a concession Yudhoyono ostensibly made on humanitarian grounds on account of a sick child on board the vessel.<sup>72</sup> Rudd also hastily brokered an agreement to deal with future arrivals whereby Australia would provide additional funding to Indonesia to intercept, detain and effectively warehouse asylum seekers for processing. Australia would help to intercept asylum seekers but would hold no responsibility for their treatment in Indonesia, a non-signatory of the Refugee Convention, or for their resettlement.

This 'Indonesian Solution' was not new — Australia had long

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67 K. Rudd, interview with Geraldine Doogue, 'Kevin Rudd: The God Factor', *Compass*, 8 May 2005, <<http://www.abc.net.au/compass/s1362997.htm>>, accessed 14 February 2013.

68 K. Rudd, in 'The God Factor'.

69 K. Rudd, in 'The God Factor'.

70 In 2001, Howard's approval rating rose eleven points to 57 per cent — M. Grattan, 'Nation Split on Rudd's Asylum-Seeker Stance', *The Age*, 9 November 2009.

71 K. Rudd, A. Albanese, M. Rann and P. Conlan, joint press conference, Adelaide, 15 October 2009, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22PRIME%20MINISTER%22%20Author\\_Phrase%3A%22rann,%20mike%22;rec=2](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source%3A%22PRIME%20MINISTER%22%20Author_Phrase%3A%22rann,%20mike%22;rec=2)>, accessed 16 January 2012.

72 B. Doherty, L. Murdoch and K. Rompies, 'Asylum Seeker Pact Starts a New Deal', *The Sydney Morning Herald*, 21 October 2009.

been funding Indonesian interference, interception and detention of asylum seekers and people smugglers<sup>73</sup> — but these incidents drew new attention to this arrangement and Rudd's now desperate reliance on it. Despite the fact that many of the Tamils had already been recognised by the UNHCR as refugees, Rudd implied that they were illegal migrants, perhaps to justify his hardened stance against a group he had otherwise promised to act compassionately towards.<sup>74</sup> With his Indonesian Solution, Rudd, like Howard before him, was determined to show that his government and no one else would decide who could come to this country and the circumstances in which they could come.

While this arrangement certainly fit the bill for 'a tough, hard-line approach to people smuggling', it failed as 'a fair and humane approach when it comes to the processing of asylum seekers'.<sup>75</sup> It failed to acknowledge or address the push factors driving forced migration or onward migration (that is, from third countries such as Indonesia to resettlement countries such as Australia). In 2009, there were more than 2000 asylum seekers and refugees registered with the UNHCR in Indonesia, where they lacked work rights and access to education, lived in appalling conditions, and faced physical abuse in Indonesian detention centres, compounds and prisons.<sup>76</sup> Since the Indonesian government made it clear that local integration was not an option, and asylum seekers in Indonesia had no legal status, the only hope for a durable solution for refugees within its territory lay with the possibility of changed circumstances in their home country that might allow for their return, or third-country resettlement. Under-resourced and overwhelmed, UNHCR processing in Indonesia was, and remains, a protracted process that typically takes years and offers little hope of resettlement at the end of the process. Resettlement figures from

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73 A Regional Cooperation Model (RCM) among Australia, Indonesia and the International Organization for Migration (IOM) was established in 2000 as an initiative of the Howard government. Taylor calculated that Australia paid a total of \$27.9 million between July 2000 and January 2008 to fund the IOM's role in the RCM. This was in addition to its funding of the UNHCR in Indonesia (\$702,000 in 2007–08) and funding supplied to the Indonesian government to improve migration management and border security in Indonesia, a cost of approximately \$18 million each year. See S. Taylor, 'Offshore Borders and Accountability', *Australian Policy Online*, 18 November 2008, <<http://apo.org.au/commentary/offshore-borders-and-accountability>>, accessed 29 March 2013.

74 Rudd, interview with Kerry O'Brien, 22 October 2009.

75 Rudd, interview with Kerry O'Brien, 22 October 2009.

76 J. Taylor, *Behind Australian Doors: Examining the Conditions of Detention of Asylum Seekers in Indonesia*, 3 November 2009, <<http://www.law.monash.edu.au/castancentre/news/behind-australian-doors-report.pdf>>, accessed 3 June 2012, p. 5.

Indonesia to Australia, the closest country of resettlement and, as it is wont to boast, one of the most generous in the world, averaged just forty-six refugees per year between 2005 and 2008.<sup>77</sup> As Taylor points out, this

... means that children are deprived of effective access to education and adults are deprived of the meaning given to life by gainful employment. Many live with the stress of separation from family members left behind, while those who brought families with them to Indonesia see their children grow to adulthood without any prospect of a safe and productive future. Depression is pervasive among adults and children and so too are psycho-physiological illnesses. It is not surprising, therefore, that even recognised refugees have made (or attempted to make) their way to Australia by boat.<sup>78</sup>

Kevin Rudd's 'solution' did not include either an overall increase in the humanitarian quota or a commitment to increase resettlement from Indonesia, suggesting that Australia was, as it always had been, more concerned about keeping boats away from its shores than offering people alternatives to risky voyages. But unlike Howard's Pacific Solution, under which asylum seekers remained Australia's responsibility, Rudd's agreement with Indonesia meant that the government effectively handed over all responsibility for the welfare of asylum seekers to a non-signatory to the Refugee Convention with a poor record of refugee protection.

The asylum seekers from the *Oceanic Viking* were taken to Bintan Island in the Indonesian archipelago to be processed at an Australian-funded detention centre in Tanjung Pinang. However, determined not to be returned to a life of limbo in Indonesia, like their compatriots in Merak the asylum seekers refused to leave the boat, instead insisting on being taken to Australia to have their asylum claims processed. Meanwhile, the Governor of the Riau Islands initially refused to allow the passengers to disembark, declaring: 'We are not a dumping ground for other countries'.<sup>79</sup> The customs vessel was eventually given a temporary security

<sup>77</sup> See S. Taylor and B. Rafferty-Brown, 'Waiting for Life to Begin: The Plight of Asylum Seekers Caught by Australia's Indonesian Solution', *International Journal of Refugee Law*, vol. 22, no. 4, 2010, p. 585.

<sup>78</sup> S. Taylor, 'Seeking an Alternative to a Life in Limbo', *Inside Story*, 22 April 2009, <<http://inside.org.au/seeking-an-alternative/>>, accessed 30 April 2009.

<sup>79</sup> Ismeth Abdullah, quoted in P. Kelly, 'Rudd's Softer Stance Mugged by Reality', *The Australian*, 17 October 2009.

clearance but was required to depart Indonesian territory by 6 November — with or without its passengers. Australia was forced to send in negotiators to encourage the asylum seekers to disembark, a move that undermined Rudd's message: *we will decide*. The *Oceanic Viking* stalemate ended a month after it began when the asylum seekers were promised accelerated processing and resettlement in Australia — within a month for the thirty-seven people already with UN refugee papers and within twelve weeks for others found to be refugees.

While Rudd insisted that 'the group [was] being treated in a manner consistent with that afforded to any other asylum seeker in Indonesia',<sup>80</sup> the Merak asylum seekers soon found this not to be the case. Observing the resolution of the *Oceanic Viking* situation, their spokesperson, 'Alex', promised: 'If we get the same deal, we will co-operate sooner than them'.<sup>81</sup> However, the *Oceanic Viking* compromise proved politically costly for Rudd and saw the government firm its resolve against the Merak asylum seekers and other unauthorised boat arrivals. Their six-month stand-off only ended when the remaining asylum seekers were removed from the boat by Indonesian authorities in April 2010 and taken to the detention centre at Tanjung Pinang with a commitment from the UNHCR to begin processing within twenty-four hours and complete it within two months.<sup>82</sup> Indonesian officials reportedly promised the asylum seekers resettlement in either Australia or Canada within twelve months.<sup>83</sup> However, no such deal existed and the Merak asylum seekers instead found themselves at the back of a very long queue.

## The Big Chill

With an election looming, the government needed to appear tougher to ameliorate voter concerns about border protection, or find a way to shut down or at least suspend the asylum-seeker issue before the election. It concocted a plan to achieve both. If the

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80 Kevin Rudd, quoted in B. Doherty, 'Oceanic Viking Breakthrough: Asylum Seekers to Come Ashore', *The Age*, 17 November 2009.

81 'Alex', quoted in T. Allard and B. Doherty, 'Indonesia Backs Down on Merak Boat People', *The Sydney Morning Herald*, 19 November 2009.

82 E. Redman, 'Why Did the Merak Asylum Seekers Get Off Their Boat?', *Crikey*, 20 April 2010, <[http://www.crikey.com.au/2010/04/20/why-did-the-merak-asylum-seekers-get-off-their-boat/?wpmp\\_switcher=mobile](http://www.crikey.com.au/2010/04/20/why-did-the-merak-asylum-seekers-get-off-their-boat/?wpmp_switcher=mobile)>, accessed 30 March 2015.

83 See T. Allard, 'Refugee Standoff Ends in Tears and Entreaties', *The Age*, 20 April 2010.



government could not stop the boats from arriving, it could find a way to block access to Australia's protection obligations and, in this way, appear in control of Australia's borders. Thus, in April 2010, despite having acknowledged that the surge in asylum seekers from Afghanistan and Sri Lanka was part of a global trend driven by ongoing conflict, insecurity and persecution in those countries,<sup>84</sup> the government implemented a three-month freeze on asylum applications for Sri Lankan applicants and a six-month freeze for Afghan applicants,<sup>85</sup> who together comprised approximately 80 per cent of boat arrivals at the time. In essence, the idea behind the processing suspension was to ride out the surge in arrivals from these two countries until more favourable country assessments could be used to reject a greater number of otherwise legitimate asylum claims.

The government cited the recent democratic elections in Sri Lanka as evidence that conditions there were improving, while the anticipated change in the situation in Afghanistan was based on a Department of Foreign Affairs and Trade cable sent from the Australian Embassy in Kabul in February 2010, which suggested that Hazaras were 'living in a golden age' and therefore leaving for economic reasons.<sup>86</sup> This was despite evidence to the contrary demonstrating that the security situation in Afghanistan had deteriorated since 2009, with ongoing targeting of Hazaras by the Taliban, who were poised to regain power in local regions.<sup>87</sup> A UN report found that there had been more civilian casualties in 2009 than in any year since the fall of the Taliban in 2001.<sup>88</sup> The ongoing

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84 See, for example, Attorney-General R. McClelland, Second Reading Speech for the Anti-People Smuggling and Other Measures Bill 2010, Commonwealth of Australia Parliamentary Debates, Senate, 24 February 2010, <[http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-02-24/0009/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-02-24/0009/hansard_frag.pdf;fileType=application%2Fpdf)>, and Minister for Immigration C. Evans, Second Reading Speech for the Anti-People Smuggling and Other Measures Bill 2010, Commonwealth of Australia Parliamentary Debates, Senate, 18 March 2010, <[http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-03-18/0086/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-03-18/0086/hansard_frag.pdf;fileType=application%2Fpdf)>.

85 C. Bowen, S. Smith and B. O'Connor, 'Changes to Australia's Immigration Processing System', joint media release, 9 April 2010.

86 See P. Maley and L. Vasek, 'Processing Ban on Afghan Asylum-Seekers Lifted', *The Australian*, 1 October 2010.

87 United Nations Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, New York, United Nations, A/64/705 - S/2010/127, 10 March 2010, <<http://daccess-ods.un.org/TMP/7451633.21495056.html>>, accessed 30 March 2015.

88 United Nations Assistance Mission in Afghanistan (UNAMA), *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009*, Kabul, UNAMA, January 2010, <<http://unama.unmissions.org/Portals/UNAMA/human%20rights/Protection%20of%20Civilian%202009%20report%20English.pdf>>, accessed 7 June 2013.

danger faced particularly by Hazaras in Afghanistan was highlighted by the forcible displacement of 1800 families in May 2010,<sup>89</sup> the discovery of the decapitated corpses of eleven Hazara men in June<sup>90</sup> and a series of attacks on schools by the Taliban in July.<sup>91</sup>

The government also introduced new measures to toughen anti-people smuggling laws, with the creation of the new offence of supporting people smuggling — even if for entirely humanitarian reasons rather than personal profit — punishable by up to ten years' imprisonment and/or a fine of \$110,000.<sup>92</sup> Thus, while asylum seekers who paid for their own voyage or those of family members on the same venture were exempt, this legislation targeted members of refugee communities and support groups in Australia who might engage, pay or otherwise help a people smuggler to bring other family members or friends to Australia. It also imperilled those who might unwittingly carry an asylum seeker to Australia or come to the aid of asylum seekers in distress at sea and bring them to Australia (as Arne Rinnan, captain of the *Tampa*, had done in 2001).<sup>93</sup> The Anti-People Smuggling and Other Measures Bill 2010 was passed by both houses of parliament in May, with the resulting Act coming into effect immediately.

Neither measure sought to address the reasons why people undertook risky journeys in order to seek asylum in Australia. The further criminalisation of people smuggling made those journeys more difficult and thus more dangerous, and the suspension of processing made them more futile, but neither stopped the boats. The suspension was an imaginative interpretation of Australia's international obligations under the UN Refugee Convention and other international treaties, but it was not without precedent; in

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89 D. Phillips, *Why Hazaras Flee: An Historical Perspective of Their Persecution — Submission for the Government's Expert Panel on Asylum Seekers*, 25 July 2012, <<http://expertpanelonasymlseekers.dpmc.gov.au/sites/default/files/public-submissions/PhillipsD.pdf>>, accessed 7 June 2013, p.7.

90 I. Sameem, J. Burch and P. Tait, 'Police Find 11 Beheaded Bodies in Afghan South', Reuters, 25 June 2010, <<http://www.reuters.com/article/2010/06/25/us-afghanistan-beheading-idUSTRE65O2ML20100625>>, accessed 7 June 2013.

91 See Phillips, 'Why Hazaras Flee'.

92 See C. Evans, 'Legislation to Combat People Smuggling', media release from the Department of Immigration, 23 February 2010, <<http://www.minister.immi.gov.au/media/media-releases/2010/ce10016.htm>>, accessed 16 March 2013; for details see the *Anti-People Smuggling and Other Measures Act 2010* (Cth), <<http://www.comlaw.gov.au/Details/C2010A00050>>, accessed 16 March 2013.

93 See M. Crock, interview with Richard Aedy, 'People Smuggling Bill', *Life Matters*, 20 April 2010, <<http://www.abc.net.au/rn/lifematters/stories/2010/2876845.htm>>, accessed 2 April 2013.

2002, Afghan asylum seekers sewed their lips together to signify their despair when the Howard government put a freeze on the processing of their asylum claims in response to reported changes in the situation in Afghanistan.<sup>94</sup>

Legal experts warned that the suspension breached the principle of non-discrimination in Article 3 of the Refugee Convention, which directs that '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin', as well as Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, while the prolonged detention that occurred as a result amounted to arbitrary detention in contravention of Article 9(1) of the ICCPR.<sup>95</sup> As well as jeopardising Australia's international reputation, it also made a mockery of Labor's own 'new' detention values, namely the use of detention as a last resort and for the shortest time practicable. While Julian Burnside QC described the new policy as 'Howard-lite',<sup>96</sup> David Manne, coordinator of the Refugee and Immigration Legal Centre, argued that the suspension was worse than the Howard government's TPV.<sup>97</sup>

If the suspension's purpose was to deter further arrivals, then, just as TPVs had been, it was ultimately ineffective.<sup>98</sup> A further fifty-seven boats arrived during the period of the freeze and the number of asylum seekers arriving in Australia by boat reached a new record high of more than 6500 by the end of 2010. It led to

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94 See F. Brennan, *Tampering with Asylum: A Universal Humanitarian Problem*, St Lucia, University of Queensland Press, 2003, p. viii.

95 D. Mortimer, C. Horan and K. Foley, *Refugee Rights: Processing Suspension Breaches International and Domestic Human Rights Law*, Human Rights Law Resource Centre, 23 May 2010, <<http://www.hrlrc.org.au/files/Suspension-Policy-Joint-Opinion-20-05-10.pdf>>, accessed 23 March 2013.

96 Julian Burnside, quoted in C. Merritt, 'Asylum-Seeker Policy Changes Likely to Backfire, Say Refugee Advocates', *The Australian*, 10 April 2010.

97 D. Manne, cited in K. Murphy and M. Grattan, 'Rudd Backflip Slams Asylum Seeker Door', *The Age*, 10 April 2010.

98 The number of asylum seekers arriving by boat increased rather than declined following the introduction of TPVs — see B. Keane, 'What Happened as a Result of TPVs and the Pacific Solution?', *Crikey*, 6 September 2011, <<http://www.crikey.com.au/2011/09/06/what-happened-as-a-result-of-tpvs-and-the-pacificsolution/>>, accessed 8 September 2011. Instead, as the Secretary of the Department of Immigration and Citizenship, Andrew Metcalfe, acknowledged during the 2011 Senate Estimates hearings, there was a change in the demographic of the boat passengers from predominantly single men to family groups, since TPVs precluded family reunion (Senate Legal and Constitutional Affairs Legislation Committee, 'Immigration and Citizenship', *Supplementary Budget Estimates 2011–12*, 17 October 2011, p. 25).

overcrowding in detention centres and exacerbated despair, creating tensions to which the government responded by sending a riot squad from the Australian Federal Police to Christmas Island following the policy's announcement.<sup>99</sup> The government was forced to reopen deactivated detention centres and to open a new facility near Weipa on Cape York.<sup>100</sup> It also resulted in a sizeable backlog of applications pending assessment, with some 1200 applications awaiting assessment by 1 October 2010 when the ban on Afghan applications was lifted.<sup>101</sup>

## A Political Martyr?

However, Rudd did not survive long enough to review the impact of the suspension. He was replaced as leader of the ALP and Prime Minister of Australia on 24 June 2010 after failing to contest a challenge by his deputy, Julia Gillard. Robert Manne contends that 'Rudd's honourable refusal to compete in what he called a race to the bottom [with the Coalition on asylum policy] was one of the reasons he was removed from the leadership of the Labor Party'.<sup>102</sup> Abbott had set the terms of the race when he announced the Coalition's rival border-protection policy at the end of May, a revival of the Pacific Solution designed to draw attention to the Coalition's 'successful' record in this area. In a press release entitled 'Restoring Sovereignty and Control to Our Borders', Abbott promised to reintroduce offshore processing (though he refused to canvass potential locations) and TPVs, and to turn back boats wherever possible. He repeatedly emphasised: 'These policies have worked before to ensure that it is the Australian government that decides who comes to our country and the circumstances under which they come — not people smugglers or those who have the means to pay them'.<sup>103</sup>

These policies appealed to the electorate, 31 per cent of whom felt that all asylum seekers arriving in Australia by boat should be

99 See M. Franklin and P. Taylor, 'Kevin Rudd Shuts Refugee Door', *The Australian*, 10 April 2010.

100 Maley and Vasek, 'Processing Ban on Afghan Asylum-Seekers Lifted'.

101 Maley and Vasek, 'Processing Ban on Afghan Asylum-Seekers Lifted'; D. Shanahan, 'Freeze Did Nothing Except Create Lengthy Backlog', *The Australian*, 1 October 2010.

102 Manne, 'The Moral Dilemma of Asylum Seeker Policy'.

103 T. Abbott, 'Restoring Sovereignty and Control to Our Borders', *The Hon Tony Abbott MP*, 27 May 2010, <<http://www.tonyabbott.com.au/LatestNews/PressReleases/tabid/86/articleType/ArticleView/articleId/7405/Joint-Press-Release--Restoring-sovereignty-and-control-to-our-borders.aspx>>, accessed 20 March 2012.

returned to their countries of origin even if they were genuine refugees.<sup>104</sup> Almost two-thirds (62 per cent) supported the proposed reintroduction of offshore processing.<sup>105</sup> The support for the Coalition's border-protection policies did little for Abbott's personal approval rating, which was as dismal as Rudd's (41 per cent, accompanied by a 51 per cent and a 52 per cent disapproval rating respectively); however, a Nielsen poll released on 7 June 2010 showed the Coalition leading Labor on a two-party-preferred basis 53 per cent to 47 per cent, representing a swing of 5.7 per cent since the 2007 election.<sup>106</sup> These poll results spelt danger for Rudd. His poor personal ratings were one thing, but now that the party too faced possible electoral defeat his future was suddenly uncertain. However, Rudd refused to countenance a return to offshore processing.<sup>107</sup> On the eve of his deposal, he explained:

I believe it is absolutely wrong for this country ... in terms of the values which we hold dear, to get engaged in some sort of race to the right in this country on the question of asylum-seekers. I don't think that's the right thing to do. That's the direction the Liberal Party would like to take us — under my leadership we will not be going in that direction.<sup>108</sup>

Kevin Rudd's response to the challenge suggests that he regarded himself, like his moral hero, Dietrich Bonhoeffer, as something of a political martyr for the asylum cause. His pointed declaration that under his continued leadership the government would 'not be lurching to the right on the question of asylum-seekers'<sup>109</sup> implied that the Prime Minister had been under pressure — and resisted calls — to implement harsher policies that might garner public support. But, as this article demonstrates, Rudd's downfall was not a case of political martyrdom (holding fast to one's principles until the very end) so much as a failure of moral leadership (failing to stand by one's principles in the face of adversity) of the very type

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104 Essential Research, *Essential Report*, 15 June 2010, <<http://www.essentialmedia.com.au/tag/asylum-seekers/page/3/>>, accessed 5 April 2013.

105 Nielsen poll for Fairfax, cited in P. Coorey, 'Labor Faces Wipeout', *The Sydney Morning Herald*, 7 June 2010.

106 P. Coorey, 'Labor Faces Wipeout'.

107 See, for example, Kevin Rudd, interview with David Koch, *Sunrise*, 28 May 2010, <<http://pandora.nla.gov.au/pan/79983/20100624-1429/www.pm.gov.au/node/6790.html>>, accessed 5 April 2013.

108 K. Rudd, 'Transcript of Prime Minister Kevin Rudd's Speech', *AdelaideNow*, 23 June 2010, <<http://www.adelaidenow.com.au/transcript-of-prime-minister-rudds-speech/story-e6frea6u-1225883458033>>, accessed 18 March 2012.

109 Rudd, 'Speech'.

that Bonhoeffer wrote about critically during his imprisonment for his role in smuggling Jews out of Germany:

The ‘reasonable’ people’s failure is obvious. With the best intentions and a naïve lack of realism, they think that with a little reason they can bend back into position the framework that has got out of joint. In their lack of vision they want to do justice to all sides, and so the conflicting forces wear them down with nothing achieved. Disappointed by the world’s unreasonableness, they see themselves condemned to ineffectiveness; they step aside in resignation or collapse before the stronger party.<sup>110</sup>

The Rudd government’s new humanitarian approach to asylum seekers was conceived during a period of respite from boat arrivals and proved to be a fair-weather policy; when tested by rising boat numbers and diminishing public support in 2009, the government abandoned its new detention values and resorted, like previous governments, to reactive, *ad hoc* measures designed to prevent, rather than protect, the vulnerable stranger from ever reaching our midst. Thus the changes to asylum policy promised by the Rudd government in its first term ultimately proved to be more symbolic than substantive, more transient than transformative, more rhetorical than real.

In fact, the shift of focus from asylum seekers to people smugglers that Rudd engendered in his first term as Prime Minister ultimately lent a moral justification to the implementation of even harsher policies in his second term. Shortly after his political resurrection in 2013, Rudd lurched further to the right than any of his predecessors when he made the ‘very hard-line decision’<sup>111</sup> to banish all (not just some) asylum seekers arriving by boat to Papua New Guinea or Nauru with no hope of resettlement in Australia ever and the possibility of indefinite detention for those who could neither be returned to their home countries nor resettled outside of Australia. While the new measures were unashamedly aimed at ‘Australians [who] have had enough’ of unauthorised boat arrivals, which peaked at more than 25,000 in 2012–13, Rudd defended them

110 D. Bonhoeffer, ‘Who Stands Fast?’, *Letters and Papers from Prison*, <[http://www.allchurch.org/ministries/index\\_5.html](http://www.allchurch.org/ministries/index_5.html)>, accessed 10 April 2013.

111 K. Rudd, joint press conference with PNG Prime Minister Peter O’Neill, Brisbane, 19 July 2013, <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%2Fmedia%2Fpressrel%2F2611766>>, accessed 16 April 2015.

on the grounds that they would save unfortunate asylum seekers from being exploited by 'evil' people smugglers and prevent further deaths at sea.<sup>112</sup> The tragic effects of these policies have recently been exposed following a growing number of self-harm incidents in Australia's offshore detention facilities, including the self-immolation of two asylum seekers on Nauru, one of whom set himself alight after screaming: 'This action will prove how exhausted we are. I cannot take it any more'.<sup>113</sup>

Unlike Bonhoeffer, Rudd did not stand — and die — by his principles. When he could not change the debate he allowed himself to be changed by it. Despite his best intentions and elegant rhetoric, Rudd did not produce a more humane set of policies; indeed, his government ultimately implemented policies that his predecessor, John Howard, would not have dreamed of and that his successor, Tony Abbott, could but thank him for.<sup>114</sup> With respect to asylum seekers, Rudd failed in both political and moral terms — his tough policies failed to stop the boats and his humane measures failed to protect the vulnerable stranger.

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112 K. Rudd, 'Australia and Papua New Guinea Regional Settlement Arrangement', media release, Brisbane, 19 July 2013, <<http://pmtranscripts.dpmc.gov.au/release/transcript-22764>>, accessed 26 May 2016.

113 B. Doherty, 'Self-Immolation: Desperate Protests against Australia's Detention Regime', *The Guardian*, 3 May 2016, <<http://www.theguardian.com/australia-news/2016/may/03/asylum-seekers-set-themselves-alight-nauru>>, accessed 3 May 2016.

114 L. Taylor, 'Rudd Announces Deal to Send All Asylum Boat Arrivals to Papua New Guinea', *The Guardian*, 19 July 2013, <<http://www.theguardian.com/world/2013/jul/19/kevin-rudd-asylum-boats-png>>, accessed 19 July 2013

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